The American
Political Science Review

Vol. X AUGUST 1916 No. 3

THE POLITICAL THEORY OF THE DISRUPTION[1]

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I

"Of political principles," says a distinguished authority,[2] "whether they be those of order or of freedom, we must seek in religious and quasi-theological writings for the highest and most notable expressions." No one, in truth, will deny the accuracy of this claim for those ages before the Reformation transferred the centre of political authority from church to state. What is too rarely realised is the modernism of those writings in all save form. Just as the medieval state had to fight hard for relief from ecclesiastical trammels, so does its modern exclusiveness throw the burden of a kindred struggle upon its erstwhile rival. The church, intelligibly enough, is compelled to seek the protection of its liberties lest it become no more than the religious department of an otherwise secular society. The main problem, in fact, for the political theorist is still that which lies at the root of medieval conflict. What is the definition of sovereignty? Shall the nature and personality of those groups

[1] No adequate history of the secession of 1843 has yet been written. What exists is for the most part pietistic in form and content. Perhaps the least unsatisfactory work is that of R. Buchanan: *The Ten Years' Conflict*, Edinburgh, 1850. The Rev. W. Hanna's *Life of Chalmers*, Vol. IV, will be found to contain much material of value, though naturally of a biased and edifying kind.

[2] J. N. Figgis: *From Gerson to Grotius*, p. 6.

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of which the state is so formidably one be regarded as in its gift to define? Can the state tolerate alongside itself churches which avow themselves *societates perfectae*, claiming exemption from its jurisdiction even when, as often enough, they traverse the field over which it ploughs? Is the state but one of many, or are those many but parts of itself, the one?

There has been no final answer to these questions: it is possible that there is no final answer. Yet the study of the problems they raise gives birth to certain thoughts which mold in vital fashion our theory of the state. They are old enough thoughts, have, indeed, not seldom been deemed dead and past praying for; yet, so one may urge, they speak with living tongues. At certain great crises in the history of the nineteenth century they have thundered with all the proud vigor of youth. A student of modern Ultramontanism will not fail to find its basis in the stirring phrases of an eleventh century pope; just as he will find set out the opposition to it in the stern words of a fifteenth century chancellor of Paris University. Strikingly medieval, too, is the political theory no less of the Oxford movement than of that Kulturkampf which sent a German prince a second time to Canossa. And in a piece of Scottish ecclesiastical history the familiar tones may without difficulty be detected.

II

On the eighteenth of May, 1843, Dr. Welsh, the moderator of the general assembly of the Established Church of Scotland took a course unique in the history of his office. He made no formal address. Instead, there came the announcement that as a protest against an illegal usurpation of the rights of the church, and in order to preserve that freedom of action essential to the assembly, two hundred and three of its members were compelled to sever their connexion with it.[3] With a large number of lay and clerical followers he then withdrew to a hall that had been prepared nearby. Prayer was offered up; the moderatorship of the seceding members was offered to and accepted by Dr. Chal-

[3] Buchanan, II, 594.

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mers; and the assembly then proceeded to constitute itself the governing body of the Free Church of Scotland.[4]

To the adequate understanding of this striking event some brief survey of early Scottish ecclesiastical history from the time of Knox's invasion is necessary. Recognized as the State Church in 1567[5] from the first a conflict of authority arose. The first general assembly had approved the Book of Discipline of the church, but the council, from the outset, was unwilling to sanction it.[6] As a result, the general assembly proceeded to act as though this approval, having reference to an ecclesiastical matter, was unnecessary. The book was made an essential part of the church's doctrinal constitution; and from the first the conception of a *societas perfecta* was of decisive importance.[7] On the threshold, therefore, of ecclesiastical history in Reformation Scotland a problem arises. For while the state never accorded the desired recognition, it is at least equally clear that the church was in no wise dismayed by that refusal. Jurisdiction, indeed, was awarded to it by the state in the same year;[8] but in terms ominous of future discord. To "declaration" no objection could be raised; but the insertion of a power to "grant" clearly cut away the ground from under the feet of Knox's contention that the power of jurisdiction was inherent without parliamentry enactment.[9] Yet, in a sense, the church's desire for the recognition of its complete spiritual powers may be said to have received its fulfilment in 1592, when it was declared that an act of supremacy over estates spiritual and temporal[10] "shall nowise be prejudicial nor derogate anything to the privilege that God has given to the spiritual office-bearers in the Kirk, concerning the heads of religion . . . . . or any suchlike censures

[4] Buchanan, II, 607.

[5] Calderwood, II, 388–389. Innes: *Law of Creeds in Scotland.* I cannot too fully acknowledge my debt to this admirable book.

[6] Innes, op. cit., p. 20.

[7] As is apparent in Melville's famous sermon before James I. Cf. Innes, p. 21.

[8] Acts of Parliament of Scotland, III, 24.

[9] Knox: *History of Reformation*, p. 257, and cf. McCrie: *History of the Scottish Church*, p. 44.

[10] 1584, c. 129. The so-called Black Acts, Calderwood, IV, 62–73.

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specially grounded and having warrant of the word of God."[11] Here, at any rate, was the clear admission that in the ecclesiastical sphere the church possessed powers no less than divine; and it may not unjustly be assumed that when the state affixed civil punishment to ecclesiastical censure, it stamped those powers with its approval.[12]

What pain the church had to endure in the next century of its history it lies outside our province to discuss; for our purpose the next halting place is its relation to the Revolution settlement. An act of 1669 had asserted the royal supremacy over the church;[13] this was rescinded,[14] and another statute, passed simultaneously, adopted the Westminster Confession as part of the law.[15] At the same time the abuse of lay patronage complained of from the outset—was abolished, and the right of ministerial appointment was practically vested in the full congregation.[16]

Clearly, there was much of gain in this settlement, though about its nature there has been strenuous debate. To Lord President Hope, for instance, the act of 1690 was the imposition of doctrine on the church by the state, and so the recognition of the latter's supremacy.[17] But it is surely clear that what actually was done was to recognize the church practice without any discussion of the difficult principles involved;[18] and even that silent and purposeful negligence did not pass uncriticized by the general assembly.[19] Yet, whatever the attitude of the state, it is certain that the church did not conceive itself, either by this act, or in the four years' struggle over subscription to its formularies, to have surrendered any part of its title to independence.[20]

[11] 1592, c. 116, Acts of Parliament of Scotland, III, 541, Calderwood, V, 162.
[12] 1593, c. 164.
[13] Acts of Parliament of Scotland, VII, 554.
[14] 1690, c. I.
[15] 1690, c. 5.
[16] McCrie, op. cit. p. 418.
[17] See his judgment in the Auchterarder case, Robertson's Report, II, 13.
[18] This is well brought out by Mr. Innes, op. cit., p. 45.
[19] Innes, op. cit., p. 46.
[20] Buchanan, I, 136, cf. Hetherington: *History of Church of Scotland*, p. 555; and for some strenuous criticism of Williams' attitude cf McCormick's *Life of Carstares*, pp. 43-4.

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The next great epoch in the history of the Scottish Church was, naturally, its connection with the act of union in 1707. So securely was it deemed to be settled that the commissioners appointed in 1705 to treat with the English Parliament were expressly excluded from dealing with the Scottish Church;[21] and the act of security was deemed fundamental to the union. The act pledged the crown to the maintenance of the acts of 1690 and 1693 in terms as solemn as well may be;[22] and it may reasonably be argued that parliament conceived itself as then laying down something very like a fundamental and irrevocable law.[23] These may, indeed, have been no more than the recognition of a specially solemn occasion; for it is certainly difficult otherwise to understand why in 1712 parliament should have restored that lay patronage which the act of 1690 abolished.[24] The measure was carried through with indecent haste by the Jacobite party, and a spirit of revenge seems to have been its chief motive.[25] From this time until almost the close of the eighteenth century the general assembly protested against the measure; but parliament could not be moved.[26]

That such a course was a violation of the act of security is, of course, evident without argument; but the chief significance of the repeal lay rather in the future than in the past. "The British legislature," Macaulay told the house of commons,[27] "violated the articles of union, and made a change in the constitution of the Church of Scotland. From that change has flowed almost all the dissent now existing in Scotland. . . . . year after year the general assembly protested against the violation but in vain; and from the act of 1712 undoubtedly flowed every secession and schism that has taken place in the Church of Scotland." This is not the exaggeration of rhetoric but the

[21] McCrie, op. cit., p. 440.

[22] Mathieson, *Scotland and the Union*, p. 183; Innes, op. cit., p. 58.

[23] See Sir H. W. Moncrieff: *Churches and Creeds*, p. 19.

[24] 10, Anne, c. 12.

[25] Woodrow's *Correspondence*, I, 77, 84. Carstares' *State Papers*, p. 82; Burnet, VI, 106–107.

[26] Innes, op. cit., p. 60.

[27] *Speeches*, II, 180.

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moderation of sober truth. For what the act of 1712 did, in the eyes at least of the church, was essentially to deal with a right fundamentally ecclesiastical in its nature and so to invade the church's own province. It became clear to the leaders of the church that so to be controlled was in fact to sacrifice the Divine Supremacy to which they laid claim. Christ could no longer be the Supreme Head of the Presbyterian Church of Scotland if that church allowed lay authority to contravene his commands. So that when it came to a choice between his headship and freedom on the one hand, and endowment on the other, they could not hesitate in their duty.

III

The disruption takes its immediate rise in an act of the general assembly in 1834.[28] There had been long signs in the church of a deep dissatisfaction with the establishment. It meant, so, at least, the voluntarists urged, enslavement to the civil power; and to the answer that the church had spiritual freedom the existence of civil patronage was everywhere deemed a sufficient response.[29] If voluntaryism was to be combated, some measure against intrusion must be taken; and it was upon the motion of Lord Moncrieff, himself a distinguished lawyer, that it was declared "a fundamental law of the church that no pastor shall be intruded on any congregation contrary to the will of the people."[30] Patronage, in fact, was not abolished; but, clearly, the need for congregational approval deprived it of its sting. It is important to note that not even among the opposition to the measure was any sort of objection urged against the competency of the general assembly to enact it.[31]

The challenge, however, was not long coming. Within six months of the decision of the general assembly, a vacancy occurred in the parish of Auchterarder in Perthshire. Lord Kinnoull, the patron, made his presentation to a Mr. Robert Young

[28] Buchanan, I, 280 ff.
[29] Id., I, 282.
[30] Id., I, 293. The motion was carried by 184 votes to 138, Id., I, p. 307.
[31] Id., I, p. 325.

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and the congregation promptly rejected him by an overwhelming majority.[32] The presbytery then took steps to carry out the veto law.[33]

Lord Kinnoull was not long in deciding to contest his rights in the courts. Into the history of the struggle it is unnecessary to enter here in any detail; the merest outline of its progress must suffice.[34] The court of session refused to accept the defence of the presbytery that the rejection of a presentee for unfitness concerned only the ecclesiastical authorities, and laid it down that the church was dependent upon the state.[35] To this the general assembly replied almost immediately in a resolution which bound the church 'to assert and at all hazards defend' not only the freedom of the church from outside interference but also its determination to exact obedience to the veto law.[36] The consequence of this defiance was the Strathbogie cases. A presbytery, following the decision of the court of session, neglected the veto act of 1834 and was suspended by the general assembly. The court of session at once protected it;[37] and ordained that the vetoed minister should be received.[38] The presbytery of Auchterarder was condemned in damages to Lord Kinnoull and Mr. Robert Young;[39] a minority of the presbytery opposed to the veto act was declared to be capable of acting as the presbytery proper, and the majority was inhibited from any interference.[40] The rejected presentee was forced upon the presbytery;[41] and the condemnation of the presbytery by the general assembly for disregard of the veto act was put on one side.[42] Truly the

[32] Buchanan, I, 399.
[33] Id., I, 408.
[34] The reader will find full details in Buchanan and the cases noted below.
[35] The Auchterarder case, No. I, Robertson's report.
[36] Buchanan, II, 479.
[37] Id., II, 284.
[38] 1840, 2, Dunlop, 585.
[39] 1840, 3, Dunlop, 282.
[40] 1841, 3, Dunlop, 778. This is the second Auchterarder case.
[41] 1843, 5, Dunlop, 1010. This is the third Auchterarder case. I have not discussed the judgments of Brougham and Cottenham, L. C., in the House of Lords, as they add nothing to the Scottish opinions.
[42] 1840, 3, D., 283.

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outcome of Knox's nationalism had been different from the conception of its founder.[43]

Attempted interference by statesmen proved of no avail.[44] Upon so fundamental an issue there could be no compromise, since it was her independence as a society that was at stake. Parliament would not surrender the position taken up by the court of session and the house of lords. "No government would recommend," Mr. Bruce told the house of commons,[45] "and no parliament would ever sanction the pretensions of the Church of Scotland, because if those claims were granted they would establish a spiritual tyranny worse and more intolerable than that of the Church of Rome from which they had been delivered." If it was less outspoken, the government, in the persons of Sir James Graham and Sir Robert Peel, was equally emphatic.[46] The assembly took the only step that lay in its power. It presented a formal claim of right in 1842[47] which set out the theory of its position. This refused, the adherents to that claim presented their protest in the following year,[48] and withdrew from the assembly to form the Free Church of Scotland.

IV

The party of which Dr. Chalmers was the distinguished leader had, whatever its deficiencies, the merit of maintaining a consistent and logical position. The church to them was a society itself no less perfect in form and constitution than that of the state. To the latter, indeed, they acknowledged deference in civil matters, "a submission," Chalmers himself said,[49] "which was unexcepted and entire." That to which they took so grave an objection was the claim laid down by the authorities of the state to an absolute jurisdiction over every department of civil-

[43] Cf. what Mr. Figgis has to say of this in his *Divine Right of Kings* (2d ed.) p. 193. I do not think he goes too far.

[44] Buchanan, II, 194.

[45] Hansard, 3d Series, Vol. 67, p. 442, March 8, 1843.

[46] Hansard, 3d Series, Vol. 67, pp. 382, 502. See also below.

[47] Buchanan, II, 663.

[48] Innes, op. cit., Appendix K.

[49] Hanna: *Life of Chalmers*, Vol. IV, p. 199.

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ized life. They admitted, in brief, her sovereignty over her own domain; it was when she entered a field they held to be without her control that the challenge was flung down. "The free jurisdiction of the church in things spiritual, the Headship of Christ, the authority of his Bible as the great statute book not to be lorded over by any authority on earth, a deference to our own standards in all that is ecclesiastical . . . . . these are our principles."[50] To them, therefore, the hand which was laid upon the church was an unhallowed hand; for when it thus struck at the foundation of her life it insulted the word of God.

The position of the Free Church is not different from that advocated by all who have accepted the principles of the Presbyterian system. It is a state of which the sovereignty is vested in the general assembly. It acknowledges no superior in the field with which it is concerned. That sovereignty is sanctioned by a right which even in high prerogative times would have seemed to its adherents a thousand times more sacred than its kingly analogue.[51] The sovereignty of the state over its own concerns is not denied; but its universality would never have been admitted. The distinction between the two societies must be maintained, otherwise the grossest absurdities would follow.[52] So Chalmers can make his striking claim. "In things ecclesiastical we decide all," he told a London audience in 1838,[53] "some of these things may be done wrong, but still they are our majorities which do it. They are not, they cannot, be forced upon us from without. We own no head of the church but the Lord Jesus Christ. Whatever is done ecclesiastically is done by our ministers as acting in his name and in perfect submission to his authority . . . . even the law of patronage, right or wrong, is in force not by the power of the state, but by the permission of the church, and with all its fancied omnipotence, has no other basis than that of our majorities to rest upon. It

[50] *Life of Chalmers*, loc. cit.

[51] Cf. Figgis: *Divine Right of Kings*, Ed. 2, p. 267.

[52] *Jus Divinum*, p. 42. Quoted in Figgis op. cit., p. 275.

[53] *Life of Chalmers*, Vol. IV, p. 54. Mr. Gladstone was present at and deeply impressed by these lectures. Morley (Pop. Ed.), I, 127.

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should never be forgotten that in things ecclesiastical the highest power of our church is amenable to no higher power on earth for its decisions. It can exclude; it can deprive; it can depose at pleasure. External force might make an obnoxious individual the holder of a benefice; it could never make him a minister of the Church of Scotland. There is not one thing which the state can do to our independent and indestructible church but strip her of her temporalities. *Nec tamen consumebatur*—she would remain a church notwithstanding, as strong as ever in the props of her own moral and inherent greatness; and although shrivelled in all her dimensions by the moral injury inflicted on many thousands of her families, she would be at least as strong as ever in the reverence of her country's population. She was as much a church in her days of suffering, as in her days of outward security and triumph; when a wandering outcast with naught but the wandering breezes to play around her, and naught but the caves of the earth to shelter her, as when now admitted to the bowers of an establishment. The magistrate might withdraw his protection, and she cease to be an establishment any longer; but in all the high matters of sacred and spiritual jurisdiction she would be the same as before. With or without an establishment, she in these is the unfettered mistress of her doings. The king by himself or by his representative might be the spectator of our proceedings; but what Lord Chatham said of the poor man's house is true in all its parts of the church to which I have the honor to belong: 'In England every man's house is his castle; not that it is surrounded with walls and battlements; it may be a straw-built shed; every wind of heaven may whistle around it; every element of heaven may enter it; but the king cannot—the king dare not.'"

A more thorough-going rejection of the royal supremacy on the one hand, and the legal theory of parliamentary sovereignty on the other, could hardly be desired. It is clear that an invasion of the church's rights is not contemplated as possible. The provinces of church and state are so different that parliament could only interfere if the rights it touched originated with itself. Such a general theory of origin the adherents of Presbyterianism

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strenuously repudiated. "Our right," Professor McGill told the general assembly of 1826,[54] "flows not from acts of parliament. I maintain the rights and powers of the Church of Scotland . . . . . to determine the qualifications of its members; that their right in this matter did not originate with parliament; that parliament left this right untouched and entire to the courts of this church—nay, that of this right it is not in the power of parliament to deprive them. . . . . The religion of Scotland was previously embraced by the people on the authority of the word of God, before it was sanctioned by parliament." It is that the relation of church to state is, in this view, that of one power to another. Nor did Professor McGill stand alone in his opinion. When, in 1834, Lord Moncrieff considered the competency of the general assembly to enact the veto law, he repudiated the contention that any part of the ecclesiastical constitution except its establishment was derived from the civil power.[55] The establishment, indeed, Presbyterians regarded as no more than a fortunate accident.[56] They were even accustomed to the distinction between their own position and that of the Church of England. "The Scottish Establishment," said Chalmers in 1830,[57] "has one great advantage over that of England. It acknowledges no temporal head, and admits of no civil or parliamentary interference with its doctrine and discipline. The state helps to support it, but it has nothing to do with its ministrations." Nor did he shrink from the obvious conclusion to such a situation. "They may call it an *imperium in imperio*," he said thirteen years later,[58] "they may say we intrude upon the legitimate power of the civil courts or the civil law. It is no more an intrusion on the civil law than Christianity is an intrusion on the world." He resented the suggestion that the church was dependent upon the state. "We are not," he told the general

[54] Quoted in Moncrieff: *The Free Church Principle* (1883), p. 35.
[55] See Moncrieff: *The Free Church*, p. 37.
[56] Buchanan, I, 367.
[57] Life, III, 270.
[58] 16 March, 1843. Moncrieff, op. cit., p. iii. The remark is all the more significant since it was made on the eve of the Disruption.

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assembly of 1842,[59] "eating the bread of the state. When the state took us into connection with itself, which it did at the time of the union, it found us eating our own bread, and they solemnly pledged themselves to the guarantees or the conditions, on which we should be permitted to eat their bread in all time coming." To the church, clearly, the act of security was the conclusion of an alliance into which church and state entered upon equal terms. It was an alliance, as Lord Balfour of Burleigh pointed out,[60] "with the state as a state in its corporate capacity," the union for certain specified purposes of one body with another. But it certainly was not conceived by the church that the acceptance of an establishment was the recognition of civil supremacy. Otherwise, assuredly, it could not have been argued, as in the resolution of the general assembly of 1838 that,[61] "her judicatories possess an exclusive jurisdiction founded on the word of God," which power ecclesiastical "flows immediately from God and the Mediator Jesus Christ."

Such, in essence, is the basis as well of the claim of right in 1842 as of the final protest in the following year. The one is a statement of the minimum the church can accept; the other is the explanation of how acceptance of that minimum has been denied. In ecclesiastical matters, the function of the civil courts was neither to adjudicate nor to inquire, but to assist and protect the liberties guaranteed to the church.[62] The maintenance of those liberties is essential to its existence, since without them it cannot remain a true church. Were it to admit any greater power in the civil courts, it would be virtually admitting the supremacy of the sovereign; but this is impossible since only Jesus Christ can be its head. Not only, so the claim holds, can the admission not be made, but the state itself has admitted the rightness of the church's argument.[63] Already in 1842 the

[59] Moncrieff, op. cit., p. 102.

[60] Hansard, 5th Series, Vol. 13, 12th Feb., 1913, p. 119.

[61] Innes, op. cit., p. 73.

[62] Buchanan, II, 633.

[63] Buchanan, II, 634. 'The above-mentioned doctrine and fundamental principle. . . . . have been by diverse and repeated Acts of Parliament, recognized, ratified, and confirmed.'

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claim foreshadows the willingness of the church to suffer the loss of her temporalities rather than admit the legality of the courts' aggression.[64] The protest of the following year does no more than draw the obvious conclusion from this claim. An inherent superiority of the civil courts, an inhibition of the ordinances of the general assembly, the suspension or reduction of its censures, the determination of its membership, the supersession of a Presbyterian majority, all of these decisions of the court of session, "inconsistent with the freedom essential to the right constitution of a Church of Christ, and incompatible with the government which He, as the Head of his Church, hath therein appointed distinct from the civil magistrate"[65] must be repudiated. So that rightly to maintain their faith they must withdraw from a corrupted church that they may reject "interference with conscience, the dishonour done to Christ's crown, and the rejection of His sole and supreme authority as king in His Church."[66]

It is worthy of remark that this is the position taken up by counsel for the church in the Auchterarder case. "If the call be shown to be a part of the law of the church," Mr. Rutherford argued before the court of session,[67] "it is necessarily a part of the law of the land—because the law of the church is recognized by the state; and, if the veto act, in regulating that call, has not exceeded the limits within which the legislature of the church is circumscribed, it is impossible in a civil court to deny the lawfulness of its enactments." From the standpoint of the church it is clear that this is theoretically unassailable. If the church has the right to regulate her own concerns she must have the right to regulate appointment of ministers. If, as a Rutherford of two centuries earlier argued,[68] "the Church be a perfect visible society, house, city, and kingdom, Jesus Christ in esse and operari; then the Magistrate, when he cometh to be Christian,

[64] Buchanan, II, 647.
[65] Buchanan, II, 649.
[66] Buchanan, II, 650.
[67] Robertson's Report, I, 356.
[68] Quoted in Figgis: *Divine Right of Kings*, p. 278.

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to help and nourish the Church, as a father he cannot take away and pull the keys out of the hands of the stewards." The state admitted her law to be its law in the act of security. The only question, therefore, that called for decision was whether the principle of non-intrusion was ecclesiastical or not. If it was, then clearly it was not ultra vires the general assembly to enact it, and, unless the act of security were to be rendered nugatory, the civil court must uphold the church's plea. In that event, to remedy the church's wrongs does not lie with the civil court. "The question is," as Mr. Rutherford argued,[69] "whether an abuse by the Church of her legislative powers will justify the interposition of this court. It has been maintained on the other side that it will in all cases. I maintain the reverse of the proposition, that however competent it may be for the State, by the power of the legislature, to withdraw their recognition of a jurisdiction which is no longer exercised so as to warrant the continuance of the confidence originally imposed, it is not within your province." "In matters ecclesiastical," he said again,[70] "even if the Church acts unjustly, illegally, ultra vires, still the remedy does not lie with this court—nor can your lordships give redress by controlling the exercise of ecclesiastical functions when in the course of completing the pastoral relation." Mr. Bell, his junior counsel even went so far as to urge the court not to hazard its dignity "by pronouncing a judgment you cannot enforce."[71]

It is to be observed that the Presbyterian theory is not the assertion of a unique supremacy. It did not claim a sovereignty superior to that of the state. Rather, indeed, did it take especial care to explain the precise limitations of its demand. "He was ready to admit," Sir George Clerk told the House of Commons in 1842,[72] "the Church of Scotland is ready to admit, that in all civil matters connected with that church the legislature is supreme. The Church of Scotland did not refuse to render unto

[69] Robertson, I, 382.
[70] Op. Cit., I, 383.
[71] Op. Cit., I, 124.
[72] Hansard, 3d Series, Vol. 35, pp. 575–81.

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Caesar the things that were Caesar's, but it would not allow of an interference with its spiritual and ecclesiastical rights." Mr. Buchanan, the historian of the Disruption, and one of its leading figures, explained at length the difference between the two organizations. "It is," he wrote of the church,[73] "no rival power, to that of the state—its field is conscience; that of the state is person and property. The one deals with spiritual, the other with temporal things, and there is therefore not only no need, but no possibility of collision between the two, unless the one intrude into the other's domain." Mr. Fox Maule, who was the authorised spokesman of the general assembly in parliament,[74] went so far as to say that even a claim to mark out the boundaries between the civil and the ecclesiastical provinces he would repudiate "because it was fraught with danger to the religious as well as the civil liberties of the country."[75] "He was aware," he remarked,[76] "that it was difficult at all times to reconcile conflicting jurisdictions, but for one he would never admit that when two courts, equal by the law and by the constitution, independent of each other, came into conflict upon matters however trifling or however important, so that one assumed to itself the right to say that the other was wrong, there was no means of settling the dispute. As he read the constitution, it became Parliament, which was the supreme power, to interfere and decide between them."[77] The separation of the two powers is, finally, distinctly set forth by the claim of right in 1842. "And whereas," it states,[78] "this jurisdiction and government, since it regards only spiritual condition, rights, and privileges, doth not interfere with the jurisdiction of secular tribunals, whose determination as to all temporalities conferred by the state upon the church, and as to all civil consequences attached

[73] Buchanan, II, 25.

[74] Buchanan, II, 572.

[75] Hansard, 3d Series, Vol. 67, p. 356, March 7, 1843.

[76] Ibid., p. 367.

[77] Yet a doubt must be permitted whether the Free Church party would have accepted a hostile decision even of Parliament. Chalmers, certainly, had no such doubts of his position as to think of mediation.

[78] Buchanan, II, 634.

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by the law to the decisions of church courts in matters spiritual, this church hath ever admitted, and doth admit, to be exclusive and ultimate as she hath ever given and inculcated implicit obedience thereto." Than this no statement could be well more plain.

Mr. Figgis, indeed, has doubts of this conclusion. "Presbyterianism," he has written,[79] "as exhibited in Geneva or Scotland, veritably claims, as did the Papacy, to control the state in the interests of an ecclesiastical corporation." Certainly this fairly represents the attitude of Knox[80] and it is the basis of the very able attack on that system by Leslie and Bramhall in the seventeenth century.[81] Yet the vital conception of the two kingdoms, separate and distinct, was put forward in the first epoch of Scottish Presbyterian history by Andrew Melville;[82] and it is safe to say that the attempt thus to define the limits of authorities basically conceived as distinct is the special contribution of Presbyterianism to the theory of political freedom. The difference is of importance since it constitutes the point of divergence between Ultramontanism and the Scottish system. The one teaches the supremacy of the ecclesiastical power, the other its coördination with the civil. Cardinal Manning, indeed, in the course of those controversies over the definition of papal infallibility in which he played so striking a part,[83] went so far as to claim that every Christian church makes the same demand of the church as the communion to which he belonged, and urged that the theories of Presbyterian writers are in substance papalist.[84] But Mr. Innes, in a convincing essay, was able most conclusively to dispose of this claim.[85] A theory of mutual inde-

[79] *Divine Right of Kings*, p. 186. But in the preface to his second edition Mr. Figgis considerably modifies his conclusion.

[80] Cf. Works, IV, 539.

[81] Cf. Leslie: *The New Association*, and Bramhall: *A Warning to the Church of England.*

[82] As Mr. Figgis notes, *Divine Right*, p. 286.

[83] See his *Caesarism and Ultramontanism* (1874).

[84] See his article in the *Contemporary Review* for April, 1874.

[85] See his article "Ultramontanism and the Free Kirk" in the *Contemporary Review* for June, 1874.

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pendence is as far as possible removed from papalism.[86] The conscience of the state and that of the church are kept as separate in Presbyterian theory as they have been combined in that of Hildebrand and his successors. Cardinal Manning, indeed, was, probably unconsciously, a fervent upholder of the Austinian theory of sovereignty; and he found his sovereign in the will of the Universal Church as expressed by its pontiff. But not even the boldest opponent of Presbyterianism can accuse it, outside its own communion,[87] of an Austinian bias. It is the antithesis of what Mr. Innes well terms the "centralised infallibility" of the Roman system.[88]

Not, indeed that contemporaries are wrong who judged that, equally in 1843 as in 1870, the implicitly Austinian doctrine of Erastianism was at stake. "We cannot," said the Catholic *Tablet*,[89] "avoid seeing that on this question they have taken their stand on the only principles which as Catholics, we can respect . . . . . their cry is down with Erastianism and so is ours." "When the civil courts," said the *North British Review*,[90] "assumed the power of determining the whole matter . . . . . the controversy was forced to assume its true character as in reality involving the very essence of the spiritual independence of the church." And Macaulay, who fought Edinburgh in the election of 1841, regretted that he could not teach the anti-Erastians some straightforward Whig doctrine.[91]

V

Not less firm than that of Chalmers and his party was the stand taken by the opponents of the Scottish Church. It is,

[86] Though the Encyclical: *Immortale Dei* of 1885 in Denziger's *Enchiridion*, pp. 501–508, and Newman's *Letter to the Duke of Norfolk* are, as I hope to show in a later paper, very akin to the Presbyterian theory; and the Jesuits of the seventeenth century worked out a similar claim.

[87] I say outside, because the General Assembly claims a control over doctrine and discipline which is very like that of an Austinian sovereign.

[88] *Contemporary Review*, Vol. 24, p. 267.

[89] Quoted in *Fraser's Magazine* for July, 1843.

[90] *North British Review*, 1849, p. 447.

[91] *Trevelyan's Life* (Nelson's Edition), II, 57.

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indeed, possible to find two, and perhaps three, different theories of the relations between church and state in the various judicial opinions upon the Auchterarder and its connected cases; but all of them, with a single exception, are traceable to one basic principle.[92] The judges found a conflict between two societies—the church and the state. Which, they asked themselves, was to prevail? Was the state to be deemed inferior to the church, since the latter was grounded upon divine authority? "Such an argument" said Lord Mackenzie,[93] "can never be listened to here." In general, the attitude of the court seemed to imply an acceptance of the argument used by the dean of faculty in his speech against the presbytery of Auchterarder. "What rights," he asked[94] "or claims had any religious persuasion against the state before its establishment . . . . when he (Mr. Whigham) described the establishment of the National Church as a compact . . . . he took too favourable a view of the matter for the defenders. For any such compact implies the existence of two independent bodies, with previous independent authority and rights. But what rights had the Church of Scotland before its establishment to assert or surrender or concede?" He put forward, in fact, the concession theory of corporate personality.[95] There were no rights save those which the state chose to confer; and the Church of Scotland was merely a tolerated association until the act of security legalised its existence. This seems to have been the judicial attitude. Lord Gillies emphatically denied the possibility of looking upon the act of security as a compact. "I observe," he said,[96] "that it is an improper term. There can be no compact, properly speaking, between the legislature and any other body in the state. Parliament, the king, and the three estates of the realm are omnipotent, and incapable of making a compact because they cannot be bound by it." Even Lord Cockburn, in his dissenting judgment, based his decision rather

[92] That of Lord Medwyn. See below.

[93] Middleton v. Anderson, 4 D., 1010.

[94] Robertson, I, 185.

[95] See my paper on the "Personality of Associations" in the *Harvard L. Review*, for February, 1916.

[96] Robertson II, 32.

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on the supposed historic basis of the veto law than on the co-equality of church and state.[97] The lord president went even further in his unqualified approval of Erastian principles. The church, he held, "has no liberties which are acknowledged *suo jure*, or by any inherent or divine right, but as given and granted by the king or any of his predecessors. . . . . The parliament is the temporal head of the church, from whose acts, and from whose acts alone, it exists as the national church, and from which alone it derives all its powers."[98] He would not for a moment admit that a conflict of jurisdiction between church and state might occur; for "an establishment can never possess an independent jurisdiction which can give rise to a conflict . . . . . it is wholly the creation of statute."[99] The general assembly has no powers, but only privileges.[100] It could not be a supreme legislature, for there could only be one such body in a state. Any other situation "would be irreconcilable with the existence of any judicial power in the country."[101]

To Lord Meadowbank the Church of Scotland seemed comparable to a corporation to which as an "inferior and subordinate department" of itself the state had given the right to make by-laws. But its power was limited; it was a statutory creation which could exercise only the powers of its founding act. "The civil magistrate," he said,[102] "must have the authority to interpose the arm of the law against what then becomes an act of usurpation on the part of ecclesiastical power. Were it otherwise anarchy, confusion, and disaster must inevitably follow." So, too, did Lord Mackenzie urge the final supremacy of the legislature, though, very significantly, he admitted that a churchman might think differently. "The subjection of the assembly, to the state," he said,[103] "is not owing to any contract between

[97] Robertson II, 359.
[98] Robertson II, pp. 2, 4, 5, 10.
[99] Cuninghame v. Lainshawe, Clarke's Report of the Stewarton case, 1843, p. 53.
[100] Robertson, II, 23.
[101] Loc. cit.
[102] Robertson, II, 88.
[103] Robertson, II, 121.

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church and state, but simply to the supreme power of the legislature, which every subject of this country must obey. . . . . I repeat therefore that when the question is raised whether anything is illegal as being contrary to act of parliament, it is utterly vain to cite any act of the assembly as supporting it in any degree."

Here, of a certainty, was the material for ecclesiastical tragedy. The difficulty felt by the majority of the court is one that lies at the root of all discussions on sovereignty. Anarchy, so the lawyer conceives, must follow unless it be clearly laid down at the outset that beyond the decision of the courts as interpreted from acts of parliament there can be no question. It is not a problem of spheres of respective jurisdiction. The legislature of the state, the king in parliament, exercises an unlimited power.[104] If the legislature be sovereign, the comparison between its powers and those of any other body becomes impossible since it follows from the premise that what parliament has ordained no other organisation can set aside. Clearly, therefore, to the jurist, the claim of the Presbyterian Church to be a *societas perfecta* was *ab initio* void; for that claim would involve the possession of a sovereignty which theory will admit to none save king in parliament.[105] That was what the lord president meant by his assertion that the church possessed not rights but privileges; for rights it could hold only by virtue of an unique supremacy, whereas privilege emphasized the essential inferiority of its position. The courts, in fact, were denying the doctrine of the two kingdoms. Where the Presbyterian saw two states within society one of which happened to be his church, the lawyer saw no distinction between society and the state and held the church to be but an arm of the latter. By grace of parliament the church might legislate on matters purely ecclesiastical, and a certain comity would give respect to its decisions. But

[104] This is of course the simple doctrine of Parliamentary sovereignty discussed by Professor Dicey in the first chapter of his *Law of the Constitution*. It is very effectively criticised in the last chapter of Professor McIlwain's *High Court of Parliament*.

[105] I have tried to work out the implications of this doctrine in a paper in the *Journal of Philosophy* on the 'Sovereignty of the State' for February, 1916.

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the power was of grace, and the respect was merely courtesy; for the definition of ecclesiastical matters in no way lay with the church's jurisdiction.[106] Clearly between such an attitude as this and the theories of Dr. Chalmers there could be no compromise. The premises of the one denied the axioms of the other. The church dare not admit what Lord Fullerton called "the supposed infallibility of the court of session"[107] without destroying its own independence. Nor could there be grounds for such a course. "No Church," the pious Buchanan told the general assembly of 1838,[108] "could ever be justified in obeying another master than Christ." It was useless to contend that if state-endowed the church must be unfree, for it was on the basis of freedom that endowment had been accepted. The demands of the court of session would make the oath of ministerial obedience a mockery.[109] So was the issue joined.

VI

The attitude of the ministry was in an important way different from that of the court of session. It was indeed, very akin to that of the moderate party in the church itself, of which the able Dr. Cook was the leader.[110] To him the church was not the creature of the state. It was independent. There were the two provinces, civil and ecclesiastical; but where a difference arose between the powers the ultimate decision must rest with the courts of law. "When any law" he urged in 1838,[111] "is declared by the competent (civil) authorities to affect civil right the Church cannot set aside such a right . . . . so to do would be to declare ourselves superior to the law of the land." To him the claim of the church seemed little less than an attempt at a new popery, and he refused from the outset to identify it

[106] Robertson, II, 37, Per Lord Gillies.
[107] Buchanan, I, 465.
[108] Buchanan, I, 472.
[109] Buchanan, I, 478.
[110] The reader of Buchanan's work should be warned that the writer's prejudices lead him consistently to misrepresent Dr. Cook's attitude.
[111] Buchanan, I, 481, II, 24.

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with liberty of conscience.[112] The acceptance of an establishment made, in his view, a vital difference. It meant that the church accepted the secular definition of its powers, and that resistance to such definition was tantamount to rebellion.[113] He did not deny the headship of Christ; but he did believe "that there may be ground for diversity of opinion as to what is comprehended under that Headship in all cases," and the decision, in an ambiguous case, where conflict arose between church and state, seemed to him to belong to the state.[114] He was impressed, as the court of session was impressed, with the impossibility of arriving at a decision if the coördination of powers be admitted, and it was clearly upon their grounds that he urged the church to give way.

It was this difference between established and voluntary churches which finally weighed with Sir Robert Peel. The right of the Roman Catholics, or the Protestant Dissenters absolutely to control those who chose to submit to their jurisdiction was unquestionable. The state would attempt no interference with it. "But if," he pointed out,[115] "a church chooses to have the advantage of an establishment, and to hold those privileges which the law confers—that church, whether it be the Church of Rome, or the Church of England or the Presbyterian Church of Scotland, must conform to the law." To him the position taken up by the church was inadmissible since it involved the rights of determining the limits of its jurisdiction. That could be done only by "the tribunal appointed by parliament, which is the house of lords." Nor did Sir James Graham, upon whom the defence of the government's attitude mainly rested, offer any greater consolation to the church. "They declare," he told the house of commons,[116] that any act of Parliament passed without the consent of the church and nation shall be void and of none

[112] Buchanan, II, 24.

[113] Buchanan, II, 261.

[114] Buchanan, II, 516. Compare with this Manning's view that the right to fix the limits of its own power was essentially the possession of the Church, *Vatican Decrees*, 1875, p. 54.

[115] Hansard, 3d Ser., Vol. 67, p. 502.

[116] Ib., March 7, 1843, pp. 382 ff.

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effect. . . . . I think that to such a claim . . . . no concession should be made." Since the sphere of jurisdiction between church and state had not been defined, to admit the Presbyterian claim would be to admit "the caprice of a body independent of law," with the result that no dispute would ever admit of settlement. The church was established by the state, and was spiritually bound by the terms of its establishment. If it was not the creature of the state, "still the state employs the church on certain terms as the religious instructor of the people of Scotland," and the employé was virtually demanding the right to lay down the conditions of its employment. That demand could not be admitted; for those conditions were embodied in statutes of which the interpretation must rest with the supreme civil tribunal. The church was definitely inferior, as a source of jurisdiction, to the house of lords. "These pretensions," he said,[117] "of the Church of Scotland, as they now stand, to coördinate jurisdiction, and the demand that the government should by law recognise the right of the church to determine in doubtful cases what is spiritual and what is civil, and thereby to adjudicate on matters involving rights of property, appears to me to rest on expectations and views so unjust and unreasonable, that the sooner they are extinguished the better."

Some points of importance deserve to be noted in this connection. The church, certainly, did not claim the right to decide the nature of its jurisdiction.[118] What it in fact claimed was the essentially historic grant of a right to control its own affairs. To itself, that right, admitted in 1690, and doubly confirmed in 1705, was wantonly violated in 1712; and the church was compelled to regard that act as a nullification of the fundamental law made but seven years previously. The real head and centre of the whole problem was thus the theory of parliamentary sovereignty. The church could not conceive an inherent right in parliament to disregard an obligation assumed with such solemnity. Nor, equally, was it within the competence of the courts to disregard an act which the church, from its stand-

[117] Hansard, March 7, 1843, pp. 382 ff.

[118] See above, the references to notes 60 and 61.

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point rightly, condemned. For the courts there could not be such a thing as a fundamental law. They could not, with the act of 1712 before them, announce that lay patronage was an ecclesiastical question, and therefore within the competence of the general assembly, for so to do would be not only to question the sovereignty of parliament, but also, implicitly, to admit that the general assembly was a coördinate legislature with parliament. A new theory of the state was required before they would admit so startling a proposition.

A second point is of interest. In the judgment of Lord Medwyn there is a theory of church and state which, impliedly at least, was also the theory of Sir Robert Peel.[119] A voluntary church possesses the authority and rights claimed by the Church of Scotland; but when the alliance with the state was made the rights must be considered as surrendered. All that the church could do is to break the agreement should it feel dissatisfied with the results of the alliance. But, as a fact, it was not law in 1838, and it is not now law, that a voluntary association is independent of the state in the degree claimed by the Scottish church. If our antagonism to such societies has not found such open expression as in France,[120]—if, in brief we have no *loi le Chapelier*,[121] —that is rather because by implication the power of control is already at hand. For, in the view of the state, immediately a church receives property upon condition of a trust, the state is the interpreter of that trust, and will interfere even with an unestablished church to secure its enforcement.[122] Lord Medwyn and Sir Robert Peel were claiming for the state a sovereignty far less than that of legal doctrine.[123] For if the church once take any step which involves property relations, it brings itself

[119] Cf. Innes, p. 74 and the interesting note on that page.

[120] Cf. Combes: *Une Campagne Laique*, p. 20—, the citation from the Duc de Broglie.

[121] And Article 29 of the Code Penale forbids associations of more than twenty persons even for social purposes. Seilhac: *Syndicats Ouvriers*, p. 64.

[122] See my paper on "The strict interpretation of Ecclesiastical trusts" in the *Canadian Law Times* for March, 1916.

[123] Sir F. Pollock has protested (10 L. Q. R. 99) that English lawyers do not now accept this view; it is certainly that of the courts.

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within the scope of the civil law; and its own inherent rights cannot be a ground of contest against the supremacy of parliament.[124] Allegiance to the law is absolute, since the law does not admit of degrees of acceptance. What Lord-Justice Clerk Hope said as to the effect of statute remains as true in relation to a voluntary body as in relation to the established church of which he spoke. "Their refusal to perform the ecclesiastical duty is a violation of a statute, therefore a civil wrong to the party injured, therefore cognisable by courts of law, therefore a wrong for which the ecclesiastical persons are amenable to law, because there is no exemption for them from the ordinary tribunals of this country if they do not obey the duties laid upon them by statute."[125] Clearly from this *impasse* disruption was the one outlet.

VII

One last judicial theory deserves some consideration. In his brilliant dissenting judgment, Lord Jeffrey took a ground very different from that of his brethren.[126] His whole conception of the problem was based on his belief that once Lord Kinnoull had presented Mr. Young to the living of Auchterarder, the proceedings became ecclesiastical in nature; and for the court of session to force Mr. Young upon the presbytery was to "intrude in the most flagrant manner almost that can be imagined, on their sacred and peculiar province. It would be but a little greater profanation if we were asked to order a church court to admit a party to the communion table,[127] whom they had repelled from it on religious grounds, because he had satisfied us that he was prejudiced in his exercise of his civil rights by the exclusion."[128] Lord Jeffrey, in fact, argues that there, is a method of discovering the right province of any action of which the exact

[124] Robertson, II, 121.

[125] Kinnoull v. Ferguson (1843), 5, D. 1010, Innes, p. 52.

[126] Robertson, II, 380 ff.

[127] But this has now been done in the Church of England. See Bannister v. Thompson (1908), p. 362, and on the rule for prohibition R. v. Dibdin (1912), A. C. 533.

[128] Robertson, II, 372.

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nature is uncertain. The result of the action ought to be considered, and if that result is fundamentally ecclesiastical rather than civil, the courts ought to treat the case as the concern of an independent and coördinate jurisdiction—the church court. He pointed out that practically every action has in some sort a civil result. "When the general assembly," he said,[129] "deposes a clergyman for heresy or gross immorality, his civil interests and those of his family suffer to a pitiable extent. But is the act of deposition the less an ecclesiastical proceeding on that account?" He adopts, it is clear, a pragmatic test of the ownership of debatable ground. The limits of jurisdiction are not, as in Chalmers's view, so clearly defined at the outset as to make collision impossible. Rather is its possibility admitted and frankly faced. What Jeffrey then suggested as the true course was to balance the amount of civil loss Lord Kinnoull would suffer against the ecclesiastical loss of the church; if that were done, he urged that the church would be seen to have suffered more, and he therefore gave his decision in its favour. The argument is a valuable contribution to that pragmatic theory of law of which Professor Pound has emphasized the desirability.[130]

VIII

It was a dictum of Lord Acton that from the study of political theory above all things we derive a conviction of the essential continuity of history. Assuredly he who sets out to narrate the comparative history of the ideas which pervade the Disruption of 1843 would find himself studying the political controversies of half a thousand years. For it is difficult to find more fundamental problems than the questions the Disruption raised; nor has there been novelty in the replies that then were made. The theory of those who opposed the Free Church has its roots far back in the Reformation. It can be paralleled from Luther and Whitgift, just as the theory of Chalmers and his adherents is historically connected with the principles with which Barclay confronted

[129] Robertson, II, 362.
[130] 27 Harv. L. Rev., 735.

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Ultramontanism, and the Jesuits a civil power that aimed at supremacy.[131]

The Presbyterians of 1843 were fighting the notion of a unitary state. To them it seemed obvious that the society to which they belonged was no mere cog-wheel in the machinery of the state, destined only to work in harmony with its motions. They felt the strength of a personality which, as they urged, was complete and self-sufficient, just as the medieval state asserted its right to independence when it was strong enough not merely to resent, but even to repudiate, the tutelage of the ecclesiastical power. They were fighting a state which had taken over bodily the principles and ideals of the medieval theocracy. They urged the essential federalism of society, the impossibility of confiding sovereignty to any one of its constituent parts, just as Bellarmine had done in the seventeenth century, and Tarquini in later days.[132] If there seems something of irony in such a union, the Miltonic identification of priest and presbyter may well stand voucher for it.[133] The problem which Presbyterian and Jesuit confronted was, after all, at bottom fundamentally identical. We must not then marvel at the similarity of the response each made.

Nor was the attitude of the court of session less deeply rooted in the past. Historically it goes back to that passionate Erastianism of Luther which was the only answer he could make to the unswerving Austinianism of Rome.[134] If, in the nineteenth century, the divinity he claimed for civil society has disappeared, the worship of a supposed logical necessity in unified governance—itself a medieval thing[135]—has more than taken its place. Lord President Hope seems to have been as horrified at the implicit

[131] Cf. Figgis: *From Gerson to Grotius*, p. 63.

[132] Figgis, op. cit., p. 184. See Tarquini: *Institutiones, passim.*

[133] It is a matter of great interest that the Presbyterians, like the Jesuits, should have had two quite distinct theories of the State, according to their political circumstances. One has to distinguish sharply in the seventeenth century between men like Cartwright with a definite theory of the two kingdoms, and that of the Presbyterians in the Parliaments of Charles I. The latter was definitely Erastian and it was against that theory that Milton intelligibly inveighed. Cf. generally, Figgis: *Divine Right of Kings*, Chapter IX.

[134] Works (Jena Ed.), II., 339.

[135] Cf. Maitland: *Gierke*, p. 102.

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federalism of the Free Church as was good Archbishop Whitgift at the federalism of Cartwright.[136] He does not understand the notion of the two kingdoms, and so falls back on the stern logic of parliamentary sovereignty. The state, so it is conceived, cannot admit limitations to its power; for from such limitation anarchy is eventually the product. Therefore the societies within the state can exist only on sufferance; and if the England of 1843 did not set an example to the France of sixty years later, it was not from want of theorising about the rights of congregations.[137] It is one of the curiosities of political thought that just as in the medieval church insistence on the unity of allegiance should ultimately have led to the reformation, yet its consequence should have been the creation of an organisation demanding no smaller rights than its predecessor. The state, like the church of past time, is set over against the individual, and stout denial is given to the reality of other human fellowship.

Between two such antithetic ideals compromise was impossible. The assertion of the one involved the rejection of the other. If the state, theoretically, was in the event victorious, practically it suffered a moral defeat. And it may be suggested that its virtual admission in 1874 that the church was right is sufficient evidence that the earlier resistance of the court of session to her claims was mistaken.[138] If it was mistaken, the source of error is obvious. A state that demands the admission that its conscience is supreme goes beyond the limits of righteous claim. It will attain a theoretic unity only by the expulsion of those who have the spirit to doubt its rectitude. It seems hardly worth while to discuss so inadequate an outlook. The division of power may connote a pluralistic world. It may throw to the winds that omnicompetent state for which Hegel in Germany and Austin in England have long and firmly stood the sponsors. Yet insofar as that destruction is achieved it will the more firmly unite itself to reality.

[136] Strype: *Life of Whitgift*, II, 22 ff.

[137] Mr. Figgis, both in his *From Gerson to Grotius* and his *Churches in the Modern State*, attacks very bitterly the Austinianism of M. Combes in his *Une Campagne Laique;* but I do not feel that he understands either the provocation to which the republic was subjected, or the trespasses of French Ultramontanism.

[138] Innes, p. 113.

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ORIGIN OF THE FRIAR LANDS QUESTION IN THE PHILIPPINES

CHARLES H. CUNNINGHAM

When the American government found itself in possession of the newly acquired portions of Spain's colonial empire, and particularly of the Philippines, it was forced to deal with many new and hitherto unfamiliar problems. Social, political and ecclesiastical characteristics were encountered there which were entirely foreign to American governmental traditions, but which were interwoven in the fabric of Philippine institutions and society by three centuries of Spanish rule. Among these was the universally recognized strength and importance of the ecclesiastical power, which in Spanish days had been fostered and protected by the state. Under the new conditions the ecclesiastical organization had to stand by itself, without governmental support.

Probably the most difficult problem which had to be solved was the celebrated friar land question. Thousands of hectares of the best land in the archipelago were owned or held by the religious orders. The friars had held these lands for centuries. The economic effect of these holdings was detrimental on account of the prohibitive rents which were demanded for them. The religious orders would not sell these lands of their own accord, and thus the Filipino agriculturists who desired to utilize them were prevented either from buying or renting. The government was also at a loss, since no taxes were paid on the lands of the church. This state of affairs was held by the American authorities to be inconsistent with the best interests of the Filipino people, and with the ideals of a free government. Mr. Taft made arrangements with the Holy See for the purchase of these lands, and thus the American government, by forcing the friars to sell, put an end to a problem which had been a cause of con-

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tention, not only under the new sovereignty, but through two centuries of Spanish rule.

Not only was the struggle over friar lands interesting and important as a series of events which actually occurred in the Philippines, New Spain and the viceroyalties of South America, and therefore characteristic of the entire Spanish colonial empire, but it involved certain principles which lay at the foundations of the relations between church and state there. The early attempts of the government to exercise jurisdiction over the friars in the matter of the inspection of their titles to lands, and the urgent pretensions of the orders to exemption on the grounds of ecclesiastical immunity, like the struggle over episcopal visitation, were only a recurrence in the Philippines of a conflict which has arisen in every country where church and state have been united and where the influence of the former has been predominant in political affairs.

At various times during the history of the islands the attention of the home authorities in Madrid had been called to the abuses of the religious orders in their tenure of lands. The general complaint was that the friars had laid claims to lands without title, and that through the seizure both of the lands of the natives and of royal domains, in addition to properties granted them by the crown, they had become extensive landlords. It was said that they had imposed heavy rentals on the natives who occupied these estates and that they had frequently dispossessed persons whose titles and right of occupation had been unquestioned before that time. They were accused of the alienation of the lands which the king had permitted them to occupy, and this proceeding was contrary to the conditions under which they were permitted to hold the royal estates. These abuses had become so flagrant that during the latter part of the seventeenth century the government at Madrid determined that something must be done to remedy this state of affairs, and it was decided that all occupants of royal lands, and all persons claiming lands on their own account should be called upon to prove their right of tenure. In accordance with this resolution

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a *cédula* was promulgated on June 7, 1687, directing the Philippine audiencia to make an investigation of the friar lands of the islands, and to report to the council of the Indies on the amount, value and rental of all properties held by the religious orders.[1] Furthermore, the king asked for an estimate of the amount of land actually required by the orders for their support. The audiencia was governing temporarily when this order was received, and in compliance therewith it commanded that each *alcalde mayor* should investigate the friar lands in his district. This was accordingly done and the audiencia reported in due time to the council of the Indies.

It must not be imagined that this situation was confined alone to the Philippines. The above investigation, which was conducted by the Philippine audiencia, may be considered as a part of a general enquiry into the validity of land titles in all of the colonies of Spain. Don Bernardino Valdés, of the council of the Indies, was given supervision over this matter in his commission as "*juez particular y privativo* for the collection of all sums due to the *real hacienda* in the viceroyalties of Peru and New Spain, through the purchase, sale and adjustment (survey) of lands, towns, villages and jurisdictions."[2] He was also given authority in the collection of "all fines and condemnations imposed by the Council and Cámara of the Indies and belonging to the royal exchequer, with the power of proceeding against all persons in these realms as well as in the Indies who are indebted to the king." He was empowered to subdelegate his authority to

[1] *Cédula* of June 7, 1687, with corresponding *testimonios;* A. I., 68–4–12.

[2] *Cédula* of October 30, 1692, King to Valdés; A. I., 68–4–12. In the words of the commission itself, Valdés was named "para poner cobro en los delitos que en el Peru y Nueva España resultaren en favor de la real hacienda por compras de villas, jurisdicciones ó qualquier bienes raices, ó cosa que se huviese, por venta enagenado de la Corona, concediendole facultad de subdelegar estas comisiones en ministros de las audiencias de Indias y otras qualesquier personas de su satisfacción para recaudar los caudales que procediesen de estos efectos, y que se remitiesen por quenta separada al mismo ministro, ó á el que le subcediese en la comisión que otorgase á las partes las apelaciones de sus sentencias á el Consejo de Indias, y que este sugeto la sirve assi y igualmente."

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judges in the colonies. Appeals from them were to be heard in the council of the Indies.[3]

In the above *cédula* no mention was made of the church. There exists nothing in the wording or contents of this order to indicate that the church or friars were or had been offenders. Valdés was charged with the investigation of the titles to all lands, forests and estates, held by any person or corporation. If, within six months after the publication of the summons the possessors had not shown the legality of their occupancy, the estates were to become a part of the royal patrimony. The king gave expression in this *cédula* to the belief that in the Indies there was much land belonging to the crown which was occupied without title or justification, a condition contrary to the royal intentions, and in actual defiance of the laws of the Indies.[4] The abuse was increasing, the *cédula* alleged, and called for amelioration.

Don Juan de Sierra Osorio, *oidor* of the audiencia of Mexico, was commissioned by Valdés to investigate and verify the status of lands, royal, private, assigned and unassigned, which were held by different individuals and corporations in the Philippines.[5] He arrived and began his work at Manila in 1695.[6] According

[3] There was some doubt in the minds of the councillors regarding the question of whether appeals should be entertained by the *juez privativo* or by the Council itself, and whether said *juez* should render account for money collected from fines directly to the Council or to the *Real Contaduría*. The *cédula* of 1692, referred to above, established the authority of the Council, but the subsequent resolution of November 13, 1717, declared that everything pertaining to *real hacienda* should be remitted *vía reservada*, without the intervention of the Council of the Indies. Two *consultas* were sent by the Council to the King on September 28, 1735, and October 30, 1736, respectively, asking for a royal resolution on the subject, and presenting arguments on both sides of the question. The matter was settled by the royal decree of November 16, 1737, which declared that thereafter the *juez de composiciones* should render account directly to the King, *vía reservada*, but that appeals in these cases should be entertained by the Council of the Indies. A. I., 141–4–5.

[4] *Recopilación de Leyes de Indias*, Lib. 4, tit. 12.

[5] Camacho Controversy, in Blair and Robertson, *Philippine Islands*, XLII, 26.

[6] Concepción, *Historia General de Philipinas*, VIII, 192. Concepción gives this date as 1675, but he contradicts himself by a subsequent discussion of

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to his commission he was subdelegated "the cognizance and settlement of (questions relating to) the lands and possessions, which, by sale or gift, have been alienated from the royal patrimony and dominion of (the) king."[7]

The lands of the church were not specifically mentioned in the commission of Valdés, neither were they referred to in that of his subdelegate, Sierra. However, there can be no question but that the conditions of land-holding by the friars constituted a grave problem in the Philippines, and that it was the royal will that the abuses of the religious should be remedied. This is evidenced by the fact that the issuance of Sierra's commission immediately followed the receipt at Madrid of the report of the audiencia, and that while in the Philippines Sierra directed the greater part of his attention to correcting the evils in the tenure of lands by the friars.

Father Concepción, however, states the object of Sierra's mission in terms more favorable to the churchmen, and in complete accordance with the commission of Valdés. According to the Augustinian historian, Sierra "was commissioned to collect certain debts due to the king, which had resulted from the sale of crown lands; (to ascertain) whether they (the friars) had alienated them, giving them away as gifts, and to see if any person or community possessed any royal lands without title, or if there had been usurpation; . . . . he (Sierra), in the name of His Majesty, gave them a year in which to remedy the matter, and to prove their claims."[8] Even here, however, we note an

Sierra's relations with Archbishop Camacho in 1698. Sierra could not have been sent to the Islands by Valdés in 1675, because the latter was not commissioned until 1692.

[7] Papal Delegate to King, June 2, 1698; Blair and Robertson, *Philippine Islands*, LX, 33.

[8] Concepción, VIII, 192–206. This question gave rise to a bitter controversy in 1906, between the modern Filipino writer, Dr. T. H. Pardo de Tavera, and the Dominicans of the University of Santo Tomás of Manila. Dr. Pardo de Tavera, in his article in the *Philippine Census* (I, 340–346), on religious conditions in the Philippines prior to the American occupation, painted a very dark picture of the work and general influence of the friars in the history of the Islands. In answer, the Dominicans cited the above quotation from the work of Concepción, to prove that Sierra was not sent for the express purpose, as

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admission on the part of the best ecclesiastical authority of the Philippines, always the champion of the church, that the object of the government was to correct abuses which had arisen in the land tenure of the friars. Whatever instructions Sierra may have had, he at once summoned the regulars to appear before him, and gave them a year in which to prove their right to the land occupied by them.[9] The friars, fortifying themselves with the Bull, *De la Cena*,[10] contended that Sierra had no authority over them by virtue of the ecclesiastical immunity afforded to them by the above papal decree.

The ecclesiastical standpoint in this matter is well expressed by the modern Dominicans of the Philippine Islands in the controversial article already referred to.[11] They agree substantially

Pardo de Tavera had alleged, of inspecting and verifying the friars' titles to lands. The statement to which the Dominicans took exception was as follows: "the King commissioned Auditor Sierra to compile data and send him a report as to the kinds of titles and descriptions of the valuable lands held by the friars, but the friars refused to furnish any information to the auditor, stating that they were exempt from any such formalities, and as . . . . they were unable to prove the legality of their titles they were declared to be "occupants in bad faith." It has been noted above that neither Sierra nor Valdés were especially commissioned to investigate the titles to the friars' lands. *See Reseña histórica de Filipinas desde su descubriniento hasta 1903*, by Dr. T. H. Pardo de Tavera (it being the original Spanish edition of the article in the Philippine Census), p. 37. See also the Dominican reply to the above: *Sobre una reseña histórica de Filipinas*, pp. 68–89.

[9] The modern historian of the Philippines, José Montero y Vidal, relates the object of Sierra's mission in terms still more unfavorable to the friars. He states that the lands referred to were the unassigned villages or lands belonging to the government, lands which had been usurped by the religious orders through the action of certain of their missionaries who had first evangelized among the Indians. Later, he says, the orders established themselves without troubling themselves as to titles.—Montero y Vidal, *Historia General de Filipinas*, I, 385.

[10] The Bull, *De la Cena* was issued by Pope Urban VIII in 1627. It censured those temporal authorities who usurped the ecclesiastical jurisdiction, revenues, incomes and properties.—Footnote by Middleton in Blair and Robertson, *Philippine Islands*, XLII, 26.

[11] *Sobre una reseña histórica*, 65–66. This work states that Sierra later declared them to be holders in bad faith, and that, to enlist support for this denunciation, he went out among the Indians, stirred up strife among them, obtained testimony against the friars by dint of blows, beatings and unheard of cruelties, and thus proved them to be usurpers.

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with Concepción, upon whose history they base their contentions. They allege that it was never the purpose of the regulars to deny the right of the king, that the friars did not at any time oppose the royal jurisdiction, but that they always abided by the laws and complied with the requirement that they should submit their titles for confirmation. However, they assert that the regulars did object to appearing before Sierra, "like criminal defendants, in spite of the *fuero* of exemption; they demurred on the grounds that they and all their possessions were exempt from his interference, that they were not obliged to appear before any court and answer judicially; that this procedure was in violation of the ecclesiastical immunity which all their estates and possessions enjoyed."[12]

The friars appealed to the audiencia against the dictum of Sierra, on the complaint that he was exceeding the powers conferred upon him by his commission, and was consequently guilty of *fuerza*,[13] but the tribunal rejected the appeal and supported the *visitador* in his struggle against the friars. Sierra, at least for a time, had the sanction of Archbishop Camacho, who had arrived in 1697.[14] The regulars turned to this prelate for support, but at this particular time Camacho was not inclined to favor them, owing to their resistance of his efforts to enforce episcopal visitation. They then appealed to Bishop Gonzales, of Nueva Cáceres, the papal delegate. The latter entertained the appeal. He went to Manila in the interests of the friars, and immediately became involved in a struggle with the arch-

[12] Concepción, *Historia General de Philipinas*, VIII, 193, *et seq.*

[13] *Fuerza (recurso de)* "Apelación para ante el juez secular contra el abuso ó violencia que consta un juez eclesiástico."—Alcubilla, *Diccionario de Administración*, V, 807. A more simple definition is that furnished by A. P. Cushing, in Blair and Robertson, *Philippine Islands*, V, 292: "*Fuerza* is injury committed by an ecclesiastical judge, (1) in hearing a case which does not come within his jurisdiction, (2) non-observance of rules of procedure, (3) unjust refusal to allow an appeal. In such cases the aid of the secular courts may be invoked by the *recurso de fuerza*, and thus cases were brought before the Audiencia." It came about that, through association, the encroachment of the civil authority upon the ecclesiastical jurisdiction was also termed *fuerza*. It was so designated in this case.

[14] Montero y Vidal, *Historia General de Filipinas*, I, 385.

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bishop, in the course of which the two prelates mutually excommunicated each other.[15] The delegate was finally overcome, however, because the audiencia supported the archbishop. Through the good offices of the governor and audiencia the prelates were respectivly persuaded to cancel their censures, and Gonzales departed to his province, with his jurisdiction as papal delegate sadly impaired by the successful defiance of the archbishop, while the friars were none the better for his efforts.[16]

On May 16, 1697, the provincials of the five leading orders which had been most prominent in resisting the claims of the civil government, were summoned before the audiencia, and there the presiding judge administered to them a severe reprimand for their defiance of the royal commands. They were charged with responsibility for the disturbances which had just been quieted, and were pronounced insubordinate for refusing to recognize the royal right of intervention in the matter of the land titles, and in resisting episcopal visitation. An interested Jesuit, who wrote at that time to a friend in Spain, described the treatment accorded to the provincials by the audiencia as "without the courteous treatment and respectful address which his Majesty himself observes" in dealing with the churchmen.[17] The audiencia, further, in three successive edicts, threatened the provincials with banishment and deprivation of their regular incomes.

In the early part of the year 1698, Sierra, whose work had extended through a period of three years and whose efforts to make the friars submit their titles to the government for inspection had been fruitless, was succeeded by another *visitador*, Don

[15] It is said that on this occasion Archbishop Camacho tried to make a bargain with the regulars. In exchange for the right of visiting them, he offered to support their pretensions to exemption from governmental interference in the land controversy. Camacho, according to the Dominicans of the University of Santo Tomás, first resisted Sierra, but when the friars would not submit to visitation he changed his attitude and sided with the *visitador* against the regulars. *Sobre una reseña histórica*, 74–77.

[16] Papal Delegate to the Pope, June 2, 1698; Blair and Robertson, *Philippine Islands*, XLII, 33–42.

[17] Blair and Robertson, *Philippine Islands*, XLII, 31.

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Juan Ozaeta y Oro, also from Mexico. The latter had instructions to modify the stringent demands of Sierra. One authority states that pressure was exerted by Governor Fausto Cruzat y Góngora, whose *residencia* was approaching.[18] At any event, according to the Dominicans referred to above, Ozaeta disapproved of all that Sierra had done with regard to the titles of the friars' lands, and requested, by *ruego y encargo*, that the friars, as a favor, and not in response to imperative summons, should present their titles extra-judicially before the secular court.[19] The regulars complied with this request without offering any objections. The *oidor* found the titles to be in proper legal form, and accepted them, thus substantiating the claims of the religious orders.[20]

The official letters of Ozaeta himself, dated September 16, 1698, which are sources of a non-ecclesiastical character, give conclusive evidence on the question of why he repudiated Sierra's acts and made peace with the friars.[21] He stated that a royal *cédula* of 1698 (no definite date, but probably his commission), forbade him, as an ordinary magistrate, to summon the friars before him,

[18] Montero y Vidal, *Historia General*, I, 388. Pardo de Tavera, *Philippine Census*, I, 342. Sierra was unquestionably superseded because his mission had failed to accomplish anything but discord. The government was obliged to accede to the friars in this controversy, as it was compelled to do in the struggle over ecclesiastical visitation. Ozaeta's work shows a change of policy similar to that revealed by the recall of Archbishop Pardo from exile by Governor Curuzaelegui. (Blair and Robertson, *Philippine Islands*, XLII, 28; L, 155, *note*).

[19] The Dominicans, often cited in this paper, make the point that it was not within the province of the *visitador* to declare that the lands were not held in good faith. He was only empowered to decide whether the papers were executed legally and in good form. They point out that the titles have held good all these years; that the critical American government has examined and found them good (though it forced the sale of the lands on the grounds that the church should not continue to hold them), and they further quote Mr. Taft as having said that if the friar lands were not held in good title, there were no lands in the Philippines that were so held.

[20] The Dominican authors of the book quoted above allege that in making this statement they are in substantial agreement with all of the celebrated historians of the Philippines, including Concepción, Fonseca, Salazar, Zúniga, Montero y Vidal, and, in fact, all except Dr. Pardo Tavera.

[21] Ozaeta to the Jesuit Provincial, September 16, 1698: A. I., 68–6–26.

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and to examine them as criminals, as had been done formerly by Sierra. He was not to examine all their holdings, but only to direct his attention to excesses which had arisen, and to well-defined complaints which clearly alleged usurpation.[22]

In Ozaeta's settlement of the question the government was temporarily vanquished. For ten years no further attempt was made by the civil authorities to cause the friars to conform to the government's earlier pretensions. The continued hostility of the friars, and their unwillingness to submit their titles to inspection moved the king, in the *cédulas* of September 10, 1709, and November 20, 1714, respectively, to give a ten years' dispensation to the orders, excusing them during that period from further interference. Notwithstanding this, the government continued to appoint magistrates for the inspection of land titles. On June 12, 1723, Don Julian Velasco, *oidor* of the audiencia of Manila, and subdelegate judge for the inspection of land titles, made a report which summarized twelve years of unsuccessful effort to exercise jurisdiction over the holdings of the friars.[23] The report of Velasco testified that only the Augustinians, the Recollects, and the Order of St. John of God had submitted to Ozaeta in 1698, but that the latter had confirmed the titles of all the orders, whether they had acknowledged his jurisdiction or not.

[22] Dr. Pardo de Tavera says that Ozaeta pigeon-holed the matter, but the whole question was settled as shown above. The government merely moderated its claims, but it did not entirely desist from them at this time. See *Philippine Census* I, 342.

[23] Velasco to Audiencia, June 17, 1723; A. I., 68–6–26. This, and the documents relative to the commission of Ozaeta, described above, are to be found as *testimonios* bearing on a subsequent commission which was given to *Oidor* Calderón, presently to be referred to.

The fact that the inspection of the titles to friar lands was only a part of the work of the *juez de composiciones* has already been stated. It may be noted again in the appointment of Velasco at a time when the friars had been exempted. This was also true in other parts of Spain's dominions. On September 27, 1697, Licentiate Don Juan Feixoo Centellas, *oidor* of the Audiencia of Guadalajara and *juez de composiciones de tierras* for Nueva Galicia and Nueva Vizcaya, made a report showing that he had passed upon the titles of twenty-three estates since he had been in office, none of which were ecclesiastical. (Feixoo to Valdés, September 27, 1697, A. I., 67–1–7.) The *juez de composiciones de tierras* has a counterpart today in the Philippines and in the United States in the court of claims.

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Because of this the audiencia decided on August 7, 1720, that those who had not submitted in 1698 should not be held as possessors in bad faith. The government showed the same disposition on this occasion as in 1698 to waive its former claims and to adopt a policy of conciliation. There can be no question but that the fear that the friars would leave the Islands if they were not permitted to enjoy complete and undisturbed possession of their estates did much to influence the government to modify its attitude in the matter of the friar lands, as well as in that of ecclesiastical visitation.[24] In his report of June 12, 1723, already referred to, Velasco recommended that further remissions be made, and that the claims of the government should be dispensed with for all time. He characterized the work of his predecessors as ineffectual, and asserted that a continuation of the effort by the government to interfere with the friar lands would continue to cause friction and ill feeling between the orders and the civil government. Velasco's recommendations were made to the king through the *real acuerdo*, which meant that they had the support of the royal audiencia.[25]

The controversy was re-opened in 1736, when the government made another attempt to cause the friars to prove title. Don Antonio de Pineda, a minister of the council of the Indies, was

[24] It must be remembered that while the government and the friars were having these differences, a much more transcendental struggle was in progress between church and state throughout the entire Spanish Empire over the question of ecclesiastical visitation. The two controversies must be considered in their inter-relation for a complete understanding of either. In the Philippines the conflict was as bitter as in any other part of the Empire, and the government had first supported the archbishop in the claims of the latter to the exercise of the prerogative of visitation. The orders would not recede from their position, however, and they threatened to leave the Islands if the prelate insisted. A great many did actually desert their parishes and come to Manila for the alleged purpose of debarkation for Spain. This alarmed the civil authorities, for, without the friars, the greater number of the parishes in the Philippines would have been without ecclesiastical occupants, on account of the paucity of secular priests. The government, therefore, receded from its position, and the friars emerged victorious in the struggle. (See my article on *The Question of Ecclesiastical Visitation in the Philippines*, in *The Pacific Ocean in History*. This paper was read at the session of the Panama-Pacific Historical Congress in July, 1915.)

[25] Velasco and Real Acuerdo to the King, June 12, 1723; A. I., 68–6–26.

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entrusted with a commission of the same character as that which had formerly been given to Valdés.[26] Pineda named Licentiate Pedro Calderón Enriquez, *oidor* of the audiencia of Manila as his representative in the Philippines. The commission of Calderón was literally a transfer to the latter of Pineda's jurisdiction in Manila, "over all suits and questions which arise pertaining to the adjustment of lands, with appeal to the superintendent, and the collection of all dues for the lands belonging to his majesty, which have not been alienated with just title."[27] Calderón was instructed to send an itemized account of all funds collected to the royal *contaduría* at Madrid, *vía reservada*.

In compliance with these instructions Calderón sent an official notice of his appointment to the provincials of the orders and societies on March 6, 1739, requesting that they place before him records and titles of all lands in their possession. This summons was variously received by the different orders. The Nuns of St. Isabel, the Recollects, Dominicans and Augustinians complied with the demands of the government during the course of the year, with the understanding that the question involved the regularity of their papers, and not the legality of their holdings. The Hospital of St. John of God, the Franciscan Order and the Society of Jesus held out, claiming ecclesiastical immunity, and citing the precedent which the government had followed since 1698. These recalcitrant orders charged Calderón with individual responsibility for this renewal of the governmental claim of the right to inspect the titles to their lands. They were confident that the king was still favorable to them, and that the action of the *visitador* would be disapproved by the sovereign. While the Franciscans refused to submit to the *oidor*, they complied to the extent of forwarding evidence of their titles directly to the council of the Indies, thus ignoring the *visitador*. The Jesuits, also, contended that the colleges should be exempted from the interference of the *oidor*.

Calderón, after a season of struggle with the orders, in which the above results were accomplished, made recommendations

[26] *Cédula* of September 27, 1736, the King to Pineda; A. I., 68–6–26.
[27] Pineda to Calderón, October 19, 1737; A. I., 68–6–26.

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which were similar in many respects to those which Valasco had made in 1723.[28] He stated that the periodical attempt of the civil government to inspect the friars' titles had caused such universal hostility and ill feeling that it was advisable to discontinue the royal claims. The government's pretensions in this matter, as in its efforts to support the archbishop in the enforcement of the principle of ecclesiastical visitation, had always met with the most determined resistance, and had generally been defeated. This, he alleged, was due to the fact that the orders were firmly entrenched, and that the government had always been forced to make concessions to them in order to secure a continuance of their religious, social and educational labors. This was especially true, he stated, because the number of secular priests available to do this work was wholly insufficient. He commented on the low educational and moral standard of the Spanish and Filipino secular clergy, expressing the opinion that they should not be trusted to teach the natives either religion or morality. He recommended, therefore, that the friars should be left in possession of such estates as they had at that time, without the interference of the government except in cases of notorious injustice, which should be called to the attention of the authorities by judicial process. He was unwilling, however, to tolerate further encroachments, or the wholesale usurpation of the lands of the natives on the part of the friars. He claimed that it was his duty and right to intervene for the protection of the property of the natives, and for the correction of such abuses as might arise in the future. Suits of this nature should be tried in the audiencia.

Calderón continued to hold the commission for the inspection and supervision of lands for fifteen years, during which time he brought the friars to account on repeated occasions. The excesses of the Dominicans, Jesuits and Augustinians on the island of Luzon from 1740 to 1750 caused several native revolts which had to be put down by armed force. The abuses of the orders, thus revealed, led to various judicial investigations, their usurpa-

[28] Calderón to Pineda, May 29, 1739; A. I., 68-6-26.

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tions were exposed and remedied, but no punishment seems to have been inflicted. The orders were deprived of the lands which they had seized, part of which were restored to the natives who had originally owned them, and part was declared to be the property of the crown. The Dominicans were also deprived of lands which they had usurped for the support of the University of Santo Tomás. Frauds were also exposed in the surveys of the lands of the Augustinians, by means of which this order was shown to have acted in collusion with certain civil officials, defrauding the government out of thousands of hectares of land.[29]

In a royal *cédula*, dated November 7, 1751, the king and council of the Indies formally approved of all that Calderón and the Manila audiencia had done in the above matters of the pacification of the Indian villages and the restoration of the lands to the rightful owners. In this *cédula* the Philippine authorities were commanded "to exercise hereafter the utmost vigilance in order that the Indians of the said villages may not be molested by the religious, and that the latter shall be kept in check in the unjust acts which they may in future attempt against not only those Indians but other natives of those islands."[30]

The audiencia of Manila, on receipt of this royal enactment, passed a resolution in September, 1753, communicating the contents of the *cédula* to the provincials of the orders of St. Dominic, St. Augustine, the Recollects, the Society of Jesus and to the prior of the convent of St. John of God. It also ordered that attested copies should be made and sent to the *alcaldes mayores* of the provinces, so that the decree might be translated into the language of the country and the natives informed of their status and of the wish of the king that they should not be molested further in the tenure of their lands.

From a legal point of view these latter activities of Calderón differed from those of the earlier years of his incumbency as *juez subdelegado de composiciones de tierras* and from those of

[29] Blair and Robertson, *The Philippine Islands*, XLVIII, 27–35; 141–145 (note).

[30] Cédula of November 7, 1751, Blair and Robertson, *The Philippine Islands*, XLVIII, 33.

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his predecessors. His recommendations of May 29, 1739, were adopted by the government and no further attempt was made to cause the friars to conform to its earlier demands that all titles of lands held by the friars should be submitted periodically for confirmation. As has been pointed out already, the government was forced to modify its attitude because of the fear that the friars would cease their missionary and parochial labors. The government, it may be said, failed in its efforts to maintain as a principle the right to inspect periodically the land titles of the friars, though it successfully upheld the right to correct such abuses as were called to its attention through legal means. The orders were compelled to accede to the right of the civil government to intervene for the protection of the natives' lands in the latter case, and the jurisdiction of the *juez subdelegado* and of the audiencia was admitted on several occasions. The friars were unable to plead ecclesiastical immunity when brought before the civil tribunals to answer charges of fraud or unjust deprivation.

The right of the religious orders to the occupancy of their lands in the Philippines seems clearly established. The various conflicts between them and the civil government served to strengthen their claims, and they were finally confirmed in the right to hold their estates without molestation as long as they did not abuse the privileges which were conferred upon them. They were not even called upon to prove their titles after 1739, except when it was in their interests to do so. This exemption placed them on a higher plane than other individuals or corporations.

The church lands were temporarily alienated in 1834 and 1846, because of an interruption in the friendly relations between the Spanish government and the papal court. In 1851 the breach was healed and the Spanish government guaranteed to the church full rights to all its lands and properties, "to acquire, hold and enjoy in propriety, and without limitations or reserve, all kinds of possessions, values,"[31] etc. On December 4, 1890, the further right was conceded to the church and to the ecclesiastical cor-

[31] *Sobre una reseña histórica*, 84–89.

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porations "to dispose of the holdings and possessions which they have in these provinces in accordance with the canon law and the legislation of the Indies." This was the status of the friar lands when the American government took possession of the islands.

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PRESIDENTIAL SPECIAL AGENTS IN DIPLOMACY

HENRY MERRITT WRISTON

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The unusual circumstances of the present diplomatic situation of the United States resulting from the European war and the revolution in Mexico have led the present administration to resort to the use of presidential diplomatic agents. The missions of ex-Governor John Lind and of William Bayard Hale to Mexico, and the errands of Col. E. M. House in Europe have aroused considerable discussion of their diplomatic status, which gives point to an effort to explain the basis for the employment of presidential special agents in diplomacy.

At no point is the Constitution more definite and specific than in dealing with the appointing power of the President. Part of Article II, Section 2 reads: "He shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." The third section of the same article reads: "The President shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session." There would seem to be no loophole here by which the President could either create an office not before existing, or, unless there is specific statutory warrant, appoint an individual to office without senatorial confirmation. There seems, however, to be at least one class of exceptions—the

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special agent[1] who serves in a diplomatic or semi-diplomatic character. His position the President alone creates; no such office is mentioned in the statutes. The President appoints him without reference to the senate, sometimes while that body is in session, and when appointment is made during a recess no provision is made for the expiration of the commission at the close of the next session of the senate. The President has never resorted, in the case of special agents, to that somewhat obvious subterfuge sometimes used in the case of postmasters—to commission during a recess, send in his name as a nominee to the senate which fails to confirm, and recommission as soon as the next recess begins. While apparently every other official agent, high and low, is appointed to a position created by the Constitution or by statute, and in a form definitely prescribed by the Constitution or statutes, the special agent constitutes an exception in both instances.

The position of special agent is nowhere mentioned in the law, except in a few appropriation acts, where men who have served in this capacity have been granted extra compensation by congress. The only statutory basis which can be claimed for them is section 291 in the Revised Statutes, which dates from May 1, 1810 but was preceded by acts of July 1, 1790 and February 9, 1793. It reads: "That when any sum or sums of money shall be drawn from the treasury, under any law making appropriation for the contingent expenses of intercourse between the United States and foreign nations, the President shall be, and is hereby authorized to cause the same to be duly settled, annually, with the accounting officers of the treasury in the manner following, that is to say: by causing the same to be accounted for, specifically in all instances wherein the expenditure thereof may, in his judgment, be made public, and by making a certificate of the amount of such expenditures as he may think it advisable not to specify; and every such certificate shall be deemed a sufficient

[1] Moore: *International Law Digest*, IV, pp. 452–457, has the only list of special agents readily available. It does not seem to pretend to completeness, apparently is not correct in all particulars, and contains practically no discussion of the problems involved.

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voucher for the sum or sums therein expressed to have been expended."

It is very clear that this act did not create any office in the sense that definite, specific positions are created, as was the case in the organization of the other departments and indeed of the remainder of the state department. Nor did this act give the President power to make appointments to any 'inferior office' without senatorial approval. On the other hand, it implied both a position and power of appointment without approval of the senate. If the President is to make payments upon his certificate, what are they to be for? They must be paid either to persons for performing duties of some character, presumably secret or confidential, or they must be applied to the purchase of gifts or other inducements customarily demanded by some types of government before treaties are formed. In the first of these alternatives there must be a person selected to do something in return for the payment: a position is implied. It is further implied that the appointment shall be vested in the President without the advice and consent of the senate. This appears from the fact that there is no provision for investigating the President's use of this fund; it cannot be inquired into unless, possibly, in case of impeachment.[2] If the President's choice were sent to the senate for confirmation, it would to some extent destroy the secrecy which the act was specifically designed to secure, a result contrary to all accepted rules of interpretation.

The second basis for this anomalous position lies in the well-known principle that the executive holds the power of initiative in foreign affairs. The passage in the Constitution which reads that the President "shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur" has never been interpreted to mean that the senate must be consulted in the negotiation of treaties. Exceptions may be found, but it has been the regular practice for the executive to negotiate treaties and present them only when complete to the senate for ratification. Even when

[2] This possibility was pointed out by President Polk, 29 Cong., I Sess., House Doc. no. 187, pp. 1–5.

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that body insists upon changes, those changes are negotiated by the executive.

It is a fact not sufficiently emphasized, perhaps, that in order to negotiate in the name of the United States a special commission must issue from the President to cover each separate negotiation. Thus the secretary of state, for instance, must be separately "appointed" to make a treaty with another country. A minister to a foreign country may make agreements only in emergencies and must limit those to mere protocols containing the explicit statement that it is signed subject to the approval of the signer's government.[3] In order to make a treaty with Spain, for instance, the minister to Spain must be given "full powers" by the President covering that particular negotiation. The minority report of the senate foreign relations committee, in upholding the appointment of William L. Putman and James B. Angell for the fisheries negotiation of 1887 without senatorial confirmation, relied on precedent. It pointed out that "the whole number of persons appointed or recognized [1789–1887] by the President, without the concurrence or advice of the senate, or the express authority of congress, as agents to conduct negotiations and conclude treaties, is four hundred and thirty-eight. Three have been appointed by the secretary of state, and thirty-two have been appointed by the President with the advice and consent of the senate. . . . . An interval of fifty-three years between 1827 and 1880 occurred during which the President did not ask the consent of the senate to any such appointment. . . . . The constitutional power of the President to select the agents through whom he will conduct such business is not affected by the fact that the senate is or is not in session at the time of such appointment, or while the negotiation is being conducted; or the fact that he may prefer to withold even from the senate, or from other countries the fact that he is treating with a particular power, or on a special subject."[4]

[3] Moore: *International Law Digest*, V, p. 179, quoting instructions to diplomatic officers of the United States (1897), p. 99.

[4] 50 Cong., I Sess., Sen. Misc. Docs., II, no. 109, pp. 103–104.

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These statements are substantiated by a list of all the persons employed by the United States in conducting negotiations between 1789 and 1887, showing the date and manner of appointment, the purposes, and the other offices held at the same time.[5] There are probably some inaccuracies in the list. There is evidence to indicate that there are; but the only changes are changes of detail which do not affect the principle involved. Writing off some on the ground of error, and neglecting many more on the ground that they were commissioned during a recess, the figures are still an impressive demonstration of the principle supported.

In that list various types of men appear as selected to carry on negotiations on behalf of the United States. The most common type is the regular diplomatic officer. Thus there are many cases where the secretary of state is appointed to negotiate; there are many more where the minister or chargé to the country involved is deputed to treat. Such constitute the great bulk of cases; they are perfectly normal and regular. Others are only slightly less regular: for instance, where the minister to Prussia was commissioned to negotiate with some minor German state to which he was not regularly accredited, or when the chargé at the Netherlands was designated to conclude a treaty with the kingdom of the Two Sicilies. These instances are not seriously irregular, and are readily explicable on the ground that, lacking a full diplomatic staff, it was necessary to use persons for purposes other than those for which they had been regularly appointed. Beyond this irregularity there is a greater. Men appear in the list who, though officers of the national government, are detailed by presidential commission to negotiate treaties, or to perform other diplomatic tasks not germane to their normal duties. Members of the supreme court and officers of the United States navy appear on the list. Finally, there is a class yet more irregular, men holding no office under the United States, taken from private life and designated for a special diplomatic task, sometimes with the advice and consent of the senate, as W. R. Davie, sent with Oliver Ellsworth and Williams Vans Murray

[5] Ibid., p. 110ff.

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to France in 1799, but more often without confirmation by the senate.

Granted that this last class is furthest from normal, the fact remains that if the President alone may commission men to negotiate for the United States, as he certainly may, since he has done so in a large majority of cases; and if he has the right to use a diplomatic officer for a purpose for which he was not originally appointed, as he evidently has; and if he may use a member of the judicial department, or a member of an arm of the military service, without senatorial approval, it is exceedingly difficult to draw a clear line which would prohibit the use of a private individual in the performance of this peculiarly presidential function. This argument, so far as it is based upon the list of persons deputed to negotiate for the United States, applies only to such special agents as were commissioned to negotiate a treaty or treaties, and does not apply to the others, whose duties are of a different character, though properly described as diplomatic.

The third basis upon which this practice rests is international usage. Its defenders have very frequently resorted to this ground for argument. Buchanan, at the time a member of the senate, is thus reported in the *Congressional Globe* for May 1842: "There was no government on the face of the earth that had not secret agents abroad unless it were our own. . . . . This amendment [Woodbury's], as he understood it, would deprive the executive of this power, a power so essential to the interests of any country that no government on the face of the earth was destitute of it."[6]

President Polk in refusing to divulge the uses made by Daniel Webster of the fund, provided under the act of May 1, 1810, pointed out that other governments had such funds absolutely at the disposal of the executive.[7]

In 1893 the majority of the foreign relations committee of the senate said: "There seems to be no reason why the government of the United States cannot, in conducting its diplomatic intercourse with other countries, exercise powers as broad and general

[6] *Congressional Globe*, IX, p. 473.
[7] 29 Cong., I Sess., House Doc. no. 187.

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or as limited and peculiar, or special, as any other government. . . . . In fact, there has been no limit placed upon the use of a power of this kind, except the discretion of the sovereign or ruler of the country."[8]

Many other instances might be cited where reliance has been put in congressional debates upon the fact that all governments have the right to appoint irregular special and confidential agents, upon whose appointment the legislative branch does not have even the customary financial checks.

The fourth basis upon which this type of appointment rests is necessity. The President is charged by the Constitution and laws with the management of foreign relations. If he is subjected to harassing limitations in delicate cases it may very well defeat the execution of his functions. Buchanan stated this forcibly. "It might become necessary very shortly—though he did not know whether he ought to allude to the fact—to send a special agent to the island of Cuba, and one to Santo Domingo; and, in such a case, to have a nomination made and confirmed by the senate, according to the ordinary method of appointing diplomatic agents, would defeat the very purpose of the appointment, because the necessary secrecy would not be preserved. If the President should hear of any movement in one of the islands belonging to the British government, upon the slave question, which was calculated to affect the interests of this country, he ought to proceed at once—with the secrecy of the grave itself, not letting his left hand know what his right was doing—and despatch a confidential agent to the spot, that he might be put in possession of early and authentic information upon every minute particular in relation to such a movement."[9] This argument states the case clearly and concretely so far as the special agent for investigation is concerned.

It was stated with equal force, and made applicable to the case of special agents to negotiate treaties, in the correspondence which preceded the first treaty with the Ottoman Empire. Mr. G. B. English, whom J. Q. Adams, as secretary of state for

[8] 53 Cong., II Sess., Sen. Report no. 227, p. 25.
[9] *Congressional Globe*, IX, p. 473.

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Monroe, sent to inquire into the possibilities of making a treaty, reported that he had interviewed the Captain Pasha, who was favorable to the United States, and who told him that the failure of Mr. Luther Bradish, sent some years before, was due to the activities of the ambassador of one of the European nations. The Captain Pasha advised that "the government of the United States . . . . . secretly authorize the commandant of their squadron in the Mediterranean to meet me in the Archipelago, with instructions to inform me precisely what it is that the United States wished to obtain of the Sublime Porte. I will communicate this overture to the Sultan himself. . . . . If the Sultan should show himself favorably disposed, an arrangement advantageous to your country may probably be effected, whereas an American ambassador who should come to Constantinople to negotiate with the Divan, would probably find himself embarrassed by intrigues which he could neither discover nor control." "Should the ambassadors of foreign powers suspect the affair, which the presence of an ambassador would undoubtedly occasion, they would set their dragoman also at work to traverse his negotiations by offering more, if they could afford it, to frustrate the success of the new ambassador."[10]

These two illustrations serve to indicate the force of the argument from necessity. Other reasons might be cited to explain why the President has resorted to the use of special agents. Such reasons should, however, rather be classed as motives for the use than as bases upon which the use rests. They explain why, this type existing, it was selected; they would not, considered alone, justify the creation of the type. The true bases are the four just outlined. The use of the special agent rests upon a presumptive legal basis; second, on the recognized right of the executive to take the initiative in foreign affairs; third, on the practice of governments generally; finally, upon the argument from necessity.

Powerful, even compelling, as these considerations are, they have not sufficed at all times to convince the legislative branch

[10] 22 Cong., I Sess., House Doc. no. 250, pp. 15–16–17.

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of the legality of the appointment of special agents. Several times one or other branch of congress has debated some phase of the problems that center about this subject. Careful study of all these discussions[11] reveals clearly the following points. First, the issue has never been stated in a clean-cut, isolated manner. In consequence it is scarcely possible even in a single instance to determine with any exactness what congressional sentiment on the principle was at any given time. Second, the debates on this subject have practically without exception been partisan. If a majority of the senate favored the administration, the minority framed resolutions for purposes of political capital. If, on the contrary, the majority was hostile to the administration, the purpose was to harass and defeat it. John Quincy Adams was correct when he noted in his diary, "The parties in the senate have always voted for or against these resolutions according as they supported or opposed the President."[12] Third, the arguments presented in congress defending the practice have, in general, been stronger than those against it. Fourth, it seems fairly clear that, while it is impossible to determine the exact status of congressional sentiment at any given moment, the principle has, nevertheless, come to be generally recognized. Debates upon the subject appear in later times to be over a definition of terms rather than upon the principle involved.

There remains but one further problem,—to make a tentative classification of special agents and of the uses for which it has been considered that they might be most wisely and effectively employed. Any one of several bases for this classification might well be selected. It would be useful and of interest, for instance, to classify them with regard to the extent of their divergence from regular diplomatic status, or as to the *degree* of power conferred.

[11] The following debates are the chief ones in which the principle was directly or indirectly at issue: Resolution by Christopher Gore in the Senate, 1814; Resolution by John Branch in the Senate, 1825; Amendment to the Appropriation bill in the Senate by Levi Woodbury, 1842; Resolution by Senate Foreign Relations committee, 1883; Debate on the Fisheries Treaty, 1888; numerous resolutions in the House and Senate upon the appointment of Blount, 1893.

[12] *Memoirs of J. Q. Adams*, Vol. IX, p. 131.

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It appears most valuable, however, to classify them according to the *nature* of powers conferred. On this latter basis they fall into two broad groups, those without 'full powers' to negotiate a treaty or treaties; and second, those with such full powers.

The first group, then, are those without treaty-making powers. They fall, in turn, into several classes, the first of which constitutes those sent for observation, investigation, and report, but without power to act. One of the most famous occasions of the use of special agents for this purpose was in the days of President Monroe. He commissioned Caesar A. Rodney, Theodorick Bland and John Graham during a recess of the senate, but since they served beyond the end of the next session they are not to be classed as recess appointments. They do not seem to have been given a formal commission, but rather a special passport which stated that they were "about to visit, in a national ship, on just and friendly objects, and at the special desire of the President, divers places and countries in South America" and requested that "whithersoever they may go, they with their suite, may be received and treated in a manner due to the confidence reposed in them . . . . by the President of the United States, and to their own merit."[13] They were not accredited to any sovereign or government and Secretary J. Q. Adams said, "They have, as you will perceive, no distinct diplomatic rank."[14] They were allowed their expenses and a salary of six thousand dollars each. It was originally planned to have this money paid them out of a special appropriation for the purpose, but Henry Clay objected so strenuously that the appropriation for the contingent fund was increased and they were paid from that. These commissioners later submitted long and detailed reports to the President.

In contrast to these very public agents there have been many secret agents sent to make confidential reports. Two of these who were sent during the preliminary skirmishes which preceded

[13] Moore: *International Law Digest*, IV, p. 453, says, "In 1816 President Monroe sent," etc. Monroe did not become President until March 4, 1817. These men were commissioned November 24, 1817.

[14] *Annals of Congress*, 15 Cong., I Sess., Vol. II, 1464.

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the negotiation of the first treaty with Turkey, Luther Bradish and G. B. English, have already been mentioned.[15]

Another class within this group contains those commissioned to countries or factions seeking recognition. Their function is to advise the President as to a proper course of action. Several have been sent at one time or other to Santo Domingo. John Hogan will serve as an illustration. He was commissioned February 21, 1845, during a session of the senate, for a period of six months and was allowed a salary of $8 a day and necessary traveling expenses.[16] This was paid out of the contingent fund. Later he put in a claim for extra remuneration, and by the general appropriation act of the thirtieth congress was given $1250 more. It may be remarked that this grant, and others like it, constitute by implication a clear recognition upon the part of congress that the appointment of such agents is constitutional and legal.

Hogan's instructions pointed out that Santo Domingo was seeking recognition. "Before deciding, however, on so important a step, it is deemed advisable to take the course heretofore adopted by the government in similar cases by sending a special agent to examine into and make report to the government of the power and resources of the republic, and especially as to its ability to maintain its independence." He was told to report specifically upon the extent and limits of territory over which the Dominican government claimed and exercised jurisdiction, the character and composition of its population, the number, discipline, and equipment of the troops, the composition of the government, and its personnel, and the financial system and resources.[17]

Hogan was but one of a large group of such individuals. Others were Rev. R. R. Gurley, sent to Liberia, A. Dudley Mann, sent to Hungary, and A. B. Steinberger, sent to Samoa. It is impossible in a brief summary to detail the circumstances under

[15] Above, pp. 487–8.
[16] 41 Cong., III Sess., House Doc. no. 42, p. 11.
[17] 41 Cong., III Sess., House Doc. no. 42, pp. 10–11.

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which each of these served, but the agent to Santo Domingo is fairly typical.[18]

The third class belonging to this group includes those sent to open the way for renewing ruptured relations. Typical of this class is William S. Parrott. His instructions, dated March 28, 1845, make clear the nature and purpose of his mission. "All diplomatic intercourse having been suspended between the governments of the United States and Mexico, it is the desire of the President to restore such an intercourse if this can be effected consistently with the national honor. To accomplish this purpose, he has deemed it expedient to send a confidential agent to Mexico. . . . . The great object of your mission and that which you will constantly keep in view in all your proceedings, is to reach the President and other high officers of the Mexican government and especially the minister of foreign affairs; and by every honorable effort to convince them that it is the true interest of their country, as it certainly is, to restore the friendly relations between the two republics. Should you clearly ascertain that they are willing to renew our diplomatic intercourse, then and not till then you are at liberty to communicate to them your official character and to state that the United States will send a minister to Mexico as soon as they receive authentic information that he will be kindly received."[19] Parrott's favorable report led to the appointment of John Slidell as minister and himself as secretary of legation in a futile effort to reopen intercourse. The classic instance of this sort of agent is Washington's use of Gouverneur Morris, in a much less formal way, to reopen negotiations with Great Britain in 1789.[20]

The fourth class belonging to this group consists of special agents sent to exchange ratifications of treaties. The best illustration is the case of Edmund Roberts, who having made treaties with Siam and Muscat, was given a new commission for the purpose of exchanging the ratifications with a salary approxi-

[18] Cf. Moore, *International Law Digest*, Vol. I, p. 214.
[19] Moore, *The Works of James Buchanan*, Vol VI, pp. 133–134.
[20] Sparks, *Washington*, Vol. X, p. 43.

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mately that of a chargé.[21] Mention is made in the senatorial debates on Woodbury's amendment[22] of two men sent to Central America as special agents of this type. One was William S. Murphy sent by Daniel Webster, while secretary of state, with a salary of $8 a day and necessary traveling expenses. It was explained that he was sent to procure the ratification of a treaty. In retort, considerable fun was made of an individual named Stevens, alleged to have been sent out by the previous administration accredited to a government that did not exist. The explanation, made by Senator Woodbury, was that he was sent to exchange the ratifications of a treaty made by a former chargé d'affaires.[23]

The fifth and last class of special agents who belong to the group without power to make a treaty, are those sent to compose or adjust a revolutionary situation and given for that purpose very wide powers. The most recent of these appointees was John Lind to whom was committed the task of eliminating Huerta from the field of Mexican affairs. An early and fairly typical example was R. M. Walsh, who was sent in 1851 to Santo Domingo and Haiti. He was directed to act in conjunction with representatives of France and England and to negotiate a peace between the two sections of the island. He conducted a tedious negotiation with the emperor of Haiti, accompanied by broad hints of intervention.

The most famous of this class was James H. Blount, who went to Hawaii in 1893 and hauled down the American flag and undid the work of the revolutionists who had overthrown the queen's government. Blount was definitely commissioned and given a letter of credence to the president of the executive and advisory councils of the provisional government of the Hawaiian Islands. He was directed, first, to investigate; second, he was given an authority as to "all matters touching the relations of this government to the existing or other government of the islands, and to the protection of our citizens therein," paramount to that of

[21] 25 Cong., II Sess., House Reports, no. 317.

[22] Above, p. 489, note.

[23] 27 Cong., II Sess., Sen Doc. no. 253. *Congressional Globe*, Vol. IX, p. 469.

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the regular minister. His exercise of that authority resulted in the return of the queen to power. It may be remarked that this mission was intended not so much as an interference in the internal affairs of a neighbor state as a rectification of the situation brought about by the unauthorized interference in the domestic affairs of Hawaii by Minister Stevens. In both the Walsh and Lind cases, however, there was a clear intent to readjust internal conditions within neighbor states for the existence of which no agent of the United States was at all responsible.

These brief citations of typical cases may serve as a basis for a tentative classification of the first group, which includes; first, those whose powers are limited to general report, public or confidential; second, those whose powers are limited to report as to the advisability of extending recognition to a country or government; third, those sent to reopen negotiations with a power with whom the relations have been broken off; fourth, those sent to exchange ratifications of treaties previously made; fifth, those with power to interpose in the domestic concerns of neighbor nations and to compose differences inimical to the vital interests of the United States.

The other broad group includes all who have been formally commissioned with power to negotiate treaties. The first class within this group consists of those with power to make a treaty of peace, and appears to be very small. It is true that the commissioners to negotiate peace with Spain in 1898 seem never to have been nominated to the senate, but they were appointed and their work was begun and completed during a recess. The commissioners to negotiate peace at the close of the War of 1812 were appointed during a recess but their nominations were sent to the senate as soon as that body assembled, with a definite statement that unless the appointments were confirmed their commissions would expire with the end of the session. The case of Nicholas Trist is of a different sort. He was appointed to proceed with the army of General Scott into Mexico as peace commissioner and was given not only plenipotentiary powers but a remarkable authority over both army and navy. In secret orders General Scott was instructed in the following terms:

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"Should he [Trist] make known to you in writing that the contingency has occurred in consequence of which the President is willing that further active military operations should cease, you will regard such notice as a direction from the President to suspend them until further orders from this department."[24] Similar orders were sent to Commodore M. C. Perry in command of the gulf fleet.[25] There has thus far appeared no parallel among special agents of this extraordinary power, save only in the case of Blount.

The reasons why this unusual form of peace negotiation was adopted are stated clearly in the instructions to Trist and in Polk's diary. "It is deemed probable that the Mexican government may be willing to conclude a treaty of peace with the United States. Without any certain information, however, as to its disposition, the President would not feel justified in appointing public commissioners for this purpose. . . . . After so many overtures rejected by Mexico this course might not only subject the United States to the indignity of another refusal, but might, in the end, prove prejudicial to the cause of peace."[26] The other reason was partly political. "The success of Mr. Trist's mission I knew . . . . must depend mainly on keeping it a secret from that portion of the Federal press and leading men in the country who, since the commencement of the war with Mexico, have been giving 'aid and comfort' to the enemy by their course."[27] The narrative of Trist's mission and of its result is too well known to need repetition here, but it will be remembered that, in its later stages, during which the treaty was actually negotiated, it was essentially a "self-constituted" mission.

The only other member of this class to whom it is necessary to refer is W. W. Rockhill, who, while the senate was in session, was invested by President McKinley in February, 1901, with "full and all manner of power and authority, for and in the name

[24] 53 Cong., II Sess., Sen. Rep. no. 227, pp. 44–45.
[25] Ibid., p. 39.
[26] 30 Cong., I Sess., Sen. Doc. no. 52, p. 81.
[27] Diary, Vol. II, p. 483.

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of the United States to meet and confer with any person or persons duly authorized thereto by the government of his majesty the emperor of China, and with the plenipotentiaries of the powers . . . . and with him or them to conduct on the part of the United States, the negotiations for a settlement of the pending questions between the powers and China."[28]

The second class in this group consists of men sent to make a treaty with a recognized nation with whom the United States had none before. The negotiation of the first treaty with Turkey illustrates this sort of special agent. After reports from several confidential agents it was decided to negotiate through irregular channels, first, because the normal mode of negotiation seemed likely to be hampered or frustrated by intrigue; second, because it seemed a less expensive plan inasmuch as it would allow the use of men on the ground, and also because it would not be likely to lead to a competition in bidding among the nations for favors; third, because failure would compromise "neither the national dignity nor future interests of the United States;"[29] fourth, because "in adopting this course the President acts in conformity with the wish he understands to have been, upon more than one occasion, expressed by the Sublime Porte, to the agents of the United States."[30] The man chosen for the work was Commodore Rodgers, in command of the Mediterranean squadron,[31] but in 1828 a new commission was issued to Captain Crane, then commanding the Mediterranean squadron, and David Offley, consul at Smyrna, "to confer, treat, and negotiate with the government of the Sublime Porte, ... concerning all matters of navigation and commerce between the United States and Turkish dominions; with full power to conclude and sign a treaty thereupon, or to give their assent to a capitulation therefor; transmitting the same to the President of the United States for his final ratification, by and with the advice and consent of the senate."[32] This negotiation failed and later a new commission

[28] Moore: *International Law Digest*, Vol. IV, p. 457.
[29] 22 Cong., I Sess., House Doc. no. 250, pp. 15–17.
[30] Ibid., p. 73.
[31] Ibid., p. 19.
[32] Ibid., p. 63.

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was issued[33] to Commodore Biddle, Offley, and Rhind, who was to be "consul of the Black Sea," when that body of water should be opened to American shipping. These emissaries were successful, the actual negotiation being in the hands of Rhind, who was received by the Turkish government at the conclusion of the treaty "in the usual style of ambassadors", having horses sent to convey him to the palace and having other marked attentions paid him.[34]

There are several other illustrations available, notably the negotiation of the first treaty with Sardinia by Nathaniel Niles in 1838, the negotiation of treaties with Switzerland, and with some of the German states by A. Dudley Mann, who was an active agent of the United States in Europe from 1846 to 1852, who later was assistant secretary of state and still later the Confederate agent, predecessor of Mason and Slidell, in Europe.

The third class which belongs to the group holding the treaty-making power are those sent to negotiate either original or supplementary treaties with barbaric states. A typical case is that of Edmund Roberts, a friend of Levi Woodbury, who had emphasized the necessity of better commercial relations in the Indian Ocean. When Woodbury became secretary of the navy, the advice of Roberts bore fruit in his own appointment, January, 1832, as special agent to negotiate treaties with Cochin China, Siam, and Muscat. He was also given blank letters of credence and told that if he found the prospects of opening trade with Japan favorable, he should fill in one of them and present himself to the emperor of Japan. His mission was kept secret and he was allowed a salary of $6 a day with the necessary traveling expenses, but was promised more ample payment if his mission was successful.[35] Roberts has left his own account of his mission in a posthumous volume entitled, *Embassy to the Eastern Courts of Cochin China, Siam, and Muscat.*[36] His reception was that of a "foreign minister" and "ambassador." He succeeded in negotiating treaties with Siam and Muscat. These were duly

[33] September 12, 1829.
[34] 22 Cong., I Sess., House Doc. no. 250, p. 94.
[35] 23 Cong., II Sess., House Doc. no. 44.
[36] New York, 1837.

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ratified by the senate without any division. There was no discussion of his status anywhere, and when he applied to congress for further remuneration in view of his success, the report of the house committee was favorable to compensating him with a salary equivalent to that of a chargé. The reason why neither this bill nor a later one for a similar purpose passed does not appear, but there is no reason to suppose that disapproval of his diplomatic "character" had any thing to do with it.

The last class belonging to this group consists of those given power to negotiate an auxiliary or explanatory treaty. Moore mentions that "Ambrose H. Sevier and Nathan Clifford were appointed by the President as special commissioners to negotiate certain explanations of the Trist treaty."[37] This appears to be a mistake for on March 14, 1848, Sevier was nominated to the senate as "commissioner of the United States, with the rank of envoy extraordinary and minister plenipotentiary to the Mexican Republic," and was confirmed on the same day.[38] Three days later the illness of Sevier caused Polk to send in the nomination of Nathan Clifford as "associate commissioner with the rank of envoy extraordinary and minister plenipotentiary." His nomination was confirmed March 18.[39] The only example seems, therefore, to be the peculiar mixture of regularity and irregularity which marked the appointment by President Cleveland of the secretary of state and of two private citizens, William L. Putnam and James B. Angell, to negotiate the fisheries treaty in 1887. The senate which had previously declared against negotiation of any sort rejected the treaty, not so much because of the manner of negotiation, as because of the fact of negotiation.

Such in tentative outline are the various types of special agents which have been employed in the diplomatic business of the United States.[40] The limited space of the present article

[37] Moore: *International Law Digest*, Vol. IV, p. 453.

[38] *Sen. Exec. Journal*, Vol. VII, p. 341–342.

[39] Ibid., 343.

[40] The regular diplomatic powers of naval officers fall outside the scope of this article. For the more important instances of the employment of naval officers as special agents see Paullin: *Diplomatic Negotiations of American Naval Officers*. It may further be noted that Indian treaties were usually made by presidential agents. (Cong. Debates, 1825–1826, Vol. II, pt. I, col. 608.)

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has prevented fulness of detail and exhaustive enumeration of cases such as the writer hopes to present at a future date. The only object has been to select significant instances and examine the main features of their application as a means of illustration. It seems clear that in most cases the use of the special agent was entirely justified and that without the employment of such an irregular agent many problems would have been much more difficult of solution, if not insoluble. Opportunity for secrecy, promptness, and the avoidance of compromising situations have all been facilitated by the use of special agents. In some few cases the motive seems to have been to preserve the initiative in foreign affairs in the hands of the President. This is true in the Trist case, but more notably so in the Putnam-Angell case where Cleveland acted in a way which was deliberately contrary to senatorial sentiment. Much criticism has been directed at the use of special agents, but this has thus far failed to reveal any misuse of the contingent fund in this respect, or any use of the special agent otherwise than for purposes which the President and his party in the senate could defensibly allege were the interests of the United States.

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PROBLEMS OF PERCENTAGES IN DIRECT GOVERNMENT

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It may be assumed at the outset that any government based on the democratic principle should, regardless of the form it may take, reflect existing public opinion. The actual method by which expression may be given to the will of the people is of secondary importance. We have relied, in the past, and are still relying on representative institutions for the performance of this prime function of democratic government. Although satisfactory results have, on most occasions, been obtained, numerous instances are on record in which the action of the people's representatives has been at variance with definitely formulated public opinion. Such instances have been pointed to by critics as indicating serious defects in the working of the representative system.

To remedy these defects the devices known as the initiative and referendum were conceived and incorporated into many state constitutions. These instruments of government enable the voters, by means of the ballot, to supplant or supplement laws enacted by their representatives by laws of their own making. They were designed not to overthrow representative government but to prevent its diversion from its proper sphere of activity. When legislation does not seem to conform to public opinion the people may, by direct exercise of the law-making power, correct the error by popular vote, and the result is to be taken as the final word in determining what the will of the people really is on the subject in point. Public opinion is thus to find expression in the will of the electorate through the balloting process.

Conceding the possibility of discovering public opinion by means of popular voting the difficulty arises of determining un-

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der what conditions the desired result is attained. Laws may be enacted by vote of the people without much concern about the number of voters participating in the procedure, but if the voting process is to express public opinion as well as make laws the size of the vote becomes important. How large a group of the voters must be in agreement in order to have its opinion taken as public opinion? Manifestly no definite answer is possible. It is, of course, impossible to obtain a completely unanimous opinion on any measure. Such is, moreover, unnecessary. On the other hand most writers agree that a majority is the minimum to be expected; but a mere majority of those who express an opinion on a measure may constitute such a small portion of the total electorate that no one would seriously contend that it voiced the will of the people as a whole. The majority should, perhaps, represent a substantial part, although not necessarily a numerical half of all the voters in order to be considered as adequate.[1] Rousseau, the great apostle of democracy, realized the difficulty of the problem but reached the conclusion that the size of the majority should vary with the importance of the issue and the necessity for action. Measures of great moment, he states, should obtain the approval of an unusually large majority, while those of less concern, and those demanding immediate solution, may be passed by a smaller majority or even a majority of one.[2]

It may be of interest to determine to what extent our present day provisions for direct legislation measure up to the standard above suggested. All States except Delaware require some sort of a referendum on the adoption of constitutional amendments. In most of them (thirty-three in all) the proposed amendment must receive a majority of all the votes cast on the proposition, while in twelve, either a majority of the electors or a majority of votes cast at the election is required. Rhode Island

[1] See A. L. Lowell, *Public Opinion and Popular Government*, pp. 4–7. Mr. Judson King, one of the ablest advocates of direct government, declares that the initiative and referendum are designed to "clear the way for the rule of the numerical majority." "New Dangers to Majority Rule," p. 4.

[2] *The Social Contract* (Tozer edition), pp. 200–201.

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and New Hampshire are the only States demanding extra majorities.[3]

In addition to these compulsory referenda on constitutional amendments eighteen States now provide for a popular vote on constitutional or statutory law by means of the initiative or referendum.[4] Of these, thirteen require ratification by a majority of those voting on the proposed measure. Three use the same basis, but require that the vote cast on the proposition shall bear a certain relation to the total vote at a regular election at which some state officials are to be chosen. The Nebraska provision, for instance, stipulates that a majority vote on a proposed law shall suffice provided the favorable vote is equal to 35 per cent of the total vote at the election. Washington and New Mexico have similar provisions, but place the percentages of the total vote at the election at thirty-three and forty respectively. Finally, Oklahoma requires a flat majority of all voting at the election to adopt measures initiated by the people, and Nevada does the same thing with respect to laws submitted under the referendum.

It is thus seen that no attempt is made in any of these provisions to obtain the approval of more than half the eligible voters for the enactment of fundamental or statutory law. Only in a comparatively few States is assurance to be found that a law so enacted will have the approval of any considerable portion of the voters. This does not, of course, indicate that the process of popular law-making is an easy one. It is, in fact, often just the reverse, because of numerous obstructions and hindrances placed in the procedure before the vote is taken. But it is clear that most of our provisions for direct legislation do not attempt to guarantee that a majority of the voters shall favor a law before it becomes effective, although they do make it *possible* for such a majority to express its will and give effect to its expression.

[3] Rhode Island requires a majority of three-fifths and New Hampshire a two-thirds majority. See J. Q. Dealey, *Growth of American State Constitutions*, p. 141.

[4] Following are the States: South Dakota, Oregon, Montana, Oklahoma, Maine, Michigan, Missouri, Arkansas, Colorado, California, Arizona, Nevada, Nebraska, New Mexico, Ohio, Washington, North Dakota and Maryland.

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Whether such a possibility has been realized may be seen by noting the operation of these provisions for direct legislation. As previously stated, provisions for the reference of proposed constitutional amendments are to be found in practically all the States. According to statistics compiled by Professor Dodd[5] about three hundred constitutional amendments were enacted by the voters during the decade from 1899 to 1908. Of these about half (150) were considered by half or more of those voting and many received total votes sufficiently large to satisfy the most skeptical critic. But the remainder (149) were ratified and went into effect with less than half of those voting at the election at which they were submitted expressing any opinion thereon. In several instances the total vote on the proposed amendment was as low as 10 or 20 per cent of the vote cast at the election. A recent example of the same kind of voting is to be found in the adoption in November 1915 of a constitutional amendment providing for the referendum in the State of Maryland. Despite a vigorous campaign for the amendment it received consideration from but 31 per cent of those voting for the various candidates for governor.

However, direct legislation in the United States should not be judged entirely by results accomplished under the usual provisions for the reference of constitutional amendments. It is well known that many such references are to be had only under conditions that seem almost to have been designed to discourage an alert electorate, even should such a thing exist. The votes on constitutional amendments should be supplemented by results obtained in States recently adopting complete initiative and referendum provisions, and in the various local communities where direct government is now to be had. Many of these provisions have been so prolific that the field thus subject to survey is an enormous one.

If by majority rule is meant popular approval of more than half of the electorate, it will, of course, rarely if ever be found anywhere. If those who do not participate in any manner in an

[5] W. F. Dodd, *Revision and Amendment of State Constitutions*, Appendix.

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election are excluded—in other words counting only the active voters in determining the majority—our popular votes on measures are sometimes although not usually successful. A striking example of a vote which cannot be criticized as to size was obtained when, in 1912, Arizona adopted thirteen statutes and constitutional amendments. Nine of the thirteen received the approval of more than half of all the voters taking part in the election; all of them were considered by more than a majority of all the eligible voters of the State, including those who remained at home.[6] Results equally as satisfactory are difficult to find, although here and there, particularly in local elections, one will find a referendum vote as large, and even larger, than the vote for candidates.

On the other hand, instances are all too numerous where comparatively few voters have devoted any attention whatsoever to measures submitted for their consideration. The affirmative vote on laws adopted by the people seems rarely to attain a size equal to or greater than half the vote at the election at which they were submitted, and the total vote cast for and against a measure is often much less than 50 per cent of the vote at the election. In some cases laws are adopted with scarcely more than one-fourth of all the voters at the election expressing an opinion one way or another. In 1912, for instance 15 per cent of the active voters of Colorado adopted a law providing for a merit system in the civil service, and the vote both for and against aggregated only 28 per cent of the vote at the election. Usually, however, the percentages are somewhat higher than this.

To one interested in expressing public opinion by popular voting election statistics are interesting and sometimes enlightening; but, as someone has remarked, there is nothing sacred about such percentages and for anyone inclined to view them in that light closer investigation often proves deeply disappointing. For instance, a referendum vote equal to 85 per cent of the vote for some candidate at the same election may appear at first glance as highly gratifying as showing great interest in the measure.

[6] For the statistics see Lowell, *Public Opinion and Popular Government*, pp. 368–369.

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But analysis of the vote may reveal the fact that a goodly portion of such assumed interest is purely fictitious. The percentage then loses much of its value. At best it can mean nothing more than that a given percentage of those voting at the election displayed sufficient interest to mark the ballot. From this it does not at all follow that the degree of interest is in proportion to the size of the vote.

It is well known that much voting, whether on men or measures, is haphazard to say the least. Just to what extent this is true must remain unknown. There are, however, sometimes present certain factors that render assistance in determining the question. When, as was true in Illinois, a fairly large vote is obtained on a proposition to amend certain specific sections of a banking law, with scarcely any explanation of the character of the measure prior to the election, and with none on the ballot, one may feel reasonably sure, with no other evidence than that furnished by common sense, that many of the votes have no meaning. Sometimes a change in the form of the ballot, the position of the measure on the ballot, or the wording of the proposition when submitted will have a very noticeable effect on the size of the vote. The adoption of the separate ballot in South Dakota and Idaho increased very materially the votes on measures,[7] although a similar change in procedure in Michigan and New York seems to have had no such effect.[8] In Illinois votes on referenda have risen and fallen consistently with each change in the method of balloting.[9] Such facts tend to confirm one's suspicions that percentage figures should be taken with a grain of salt.

One frequently hears the assertion that, after all, the size of the vote in direct legislation is a matter of little moment. It is said that it is the intelligent, alert, interested citizen who votes and the illiterate, ignorant, disinterested citizen who abstains

[7] Dodd, *Revision and Amendment of State Constitutions*, p. 279.

[8] J. A. Fairlie, *Referendum and Initiative in Michigan. Annals of the American Academy of Political and Social Science*, Vol. 43, 148 (Sept., 1912).

[9] See an article by the author on the "Working of the State-wide Referendum in Illinois," AMERICAN POLITICAL SCIENCE REVIEW, Vol. V, 394 (1911).

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from voting. The habitual non-voter is conceived to be a sort of undesirable member of the body politic who could add nothing to the value of the results even if he should cast his ballot, and is, therefore, to be encouraged in remaining in modest retirement, while the active majority, or even a decided minority, proceed with the work of governing.

It is unfortunate that there is so little direct evidence to determine the character of the non-voter. That he is uninterested goes without saying; but it is by no means so certain that he is ignorant and illiterate. Those who assume that the votes on propositions referred to the people always come from the desirable members of the community seem to forget the existence, particularly in some of our large municipalities, of powerful political organizations and the influence they exert at elections. These organizations can usually be relied upon to bring out the vote when necessary and the vote thus produced can scarcely be said to represent, in all cases, the intelligence of the community.[10] Recent surveys of election returns by wards in Cincinnati would seem to indicate that the non-voter is to be found in rich and well-to-do sections almost as frequently as in districts where ignorance and vice reign supreme. Such may not, of course, be true in other cities and it is perhaps true that in rural sections the least desirable elector is the non-voter. At the same time the assumption that those who vote on referenda represent the cream of the electorate may be questioned. The initiative and referendum may be used in the interest of bad government as well as good government, and the type of voter called out by the reference of a measure will probably depend upon the nature of the issue and the interests it affects.

Regardless of how liberal one is inclined to be in his interpretation of election returns it must be concluded that we do

[10] An illustration somewhat to the point may be found in a recent election held in the city of Cincinnati when an ordinance granting a twenty-five year franchise to a street railway company was submitted for popular ratification. The ordinance was considered by many to be unduly unfavorable to the company and the prediction was current that if a large vote could be obtained it would be defeated. This prediction was verified by the results, for the measure was rejected with a much larger total vote than was anticipated.

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not always get public opinion expressed with our systems of direct legislation. Although there are many instances to the contrary, and in some sections they are numerous, the fact remains that laws and constitutional amendments are too frequently enacted by very small parts of the electorate. When this happens the vote, aside from the point that it may or may not have produced desirable legislation, is, because of its size, defective as a reflector of the will of the community.[11] Moreover it opens the way for the introduction of the very evil that direct government was designed to cure, that is, legislation in the interest of special groups and classes. It is true that experience seems to indicate that the initiative and referendum have been more successful in preventing this sort of legislation than in encouraging it; but with their introduction into States where electoral lethargy is greater than in the States now using these devices the dangers of direct legislation by small minorities are likely to become more manifest.

That brings us directly to the question as to the desirability of changing the percentage requirements in order to insure that, where group interests are reflected in a popular vote, the group shall represent at least a substantial part of the total electorate. Is it feasible to require more than half the total number of votes to express a favorable opinion of a proposed law before it shall go into effect? Or is it desirable that a certain percentage of those who participate at the election shall be required to vote yes or no on a proposition in order to be certain that some considerable portion of the voters have considered the matter at all?

To those whose passion for majority rule outweighs all other considerations, the answer to the above inquiries is clear. By all means impose such restrictions as may be necessary to make sure that all statutes and constitutional amendments enacted by the people shall have the approval of a majority of the voters. In principle this conclusion would be logically sound, for it is in the vote of the majority that the will of the people is to find expression. However, if our experience with direct government has

[11] A small vote may, of course, indicate the absence of a clearly defined public opinion on the proposition. This is likely to be true when questions of a technical nature are submitted.

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proved anything it is that such a restriction could and would have but one result. It would defeat practically every measure submitted unless some form of compulsory voting were used in conjunction with it. As already noted instances are on record where votes of sufficient size have been obtained, but they constitute an exception to the rule. In the past when attempts have been made to impose such restrictions propositions of all kinds have been uniformly defeated by apathetic voters and have gradually ceased to appear on the ballots because of hopeless despair of their success.

Now, it is believed that the initiative and referendum are too valuable instruments of good government to be thus destroyed. Conceding the point that they have not been uniformly successful in producing legislation by the majority it must be admitted that they have, generally speaking, come nearer doing so than have other schemes that have been tried. If this is the goal toward which we are striking then direct government should not be abandoned or be permitted to expire by atrophy in search of an ideal which for the present seems unattainable. Legislation in the interests of a minority is, of course, possible in representative government. No argument is necessary to convince us of that. Under our system of representation it not infrequently happens that the choice of the legislator is decidedly a minority choice. Moreover all that has been said concerning the apathy of the voters and the value of percentage figures in connection with the initiative and referendum may be applied with equal force to the election of members of our legislatures. Even though elected by a minority it is, indeed, possible for the representatives to register public opinion in laws; but there can be no adequate guarantee that such will be the result, and instances in which laws have been passed which palpably ignored a clearly defined public opinion are all too numerous. Majority rule is by no means assured in representative government. Minority control may likewise be possible under the initiative and referendum, but the controlling minority can scarcely be more vicious here because it is a different minority, as it is likely to be. Nevertheless the potential check afforded by the initiative and refer-

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endum will itself in most cases warrant their retention as workable instruments even if they mean nothing more than a check of one minority over another.

But direct legislation has a positive value far greater than this. If it be true that there is something wrong with our government it is perhaps fundamentally due to the indolence, indifference or ignorance of the electorate. To cure our ills we must, therefore, reform the voters, and in this stupendous task direct government promises much. As Professor Reinsch has so well said, "This institution will assist the people, the body of the electorate, in the development of its political consciousness; the consciousness of power which it brings will assist in that direction. Secondly, it will make the body of the electorate more familiar with legislative problems and more interested. . . . . nothing will so train the electorate to see the difficulties and problems of legislation, and to form an intelligent opinion about them, as having to solve these problems itself at times. Moreover, it will increase the interest of the people in the legislatures as being organs which are constantly engaged in dealing with these important matters."[12] Certainly if direct legislation has promise in this direction it would be folly to destroy its usefulness by imposing unworkable restrictions upon its operation. To do so would kill the goose, which, if it has not already laid the golden egg, is at least expected to do so.

Provisions, therefore, requiring an affirmative vote of a majority at an election for measures submitted by initiative or referendum must be considered as highly undesirable under existing conditions. Can the same be said of such requirements as have been recently incorporated into the constitutions of Nebraska, New Mexico and Washington, where the affirmative vote must not only be a majority of the votes on the measure, but at least from 33 to 40 per cent of the vote at the election? Such provisions should be tested by the same standard as has been applied to the more stringent requirement. Should their operation prove so disastrous as practically to destroy the use-

[12] "The Initiative and Referendum," *Proceedings of the Academy of Political Science*, Oct. 26, 1912, p. 158.

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fulness of the initiative and referendum, they should not be tolerated despite the dangers that lurk in legislation by minorities. The degree of development of political intelligence and alertness should decide the question for any particular commonwealth. It is believed, however, that some of our States have shown that, with respect to them, such restrictions would not be onerous. When three-fourths of the voting electorate habitually attend to propositions submitted to them, as is true in Oregon, a requirement that a third of the total vote should be favorable to the measure is not unduly burdensome and is a step in the right direction.[13] It should not be possible for 3 or 4 per cent of the active voters—and by active voters is meant those actually voting—to amend the fundamental law, as was done in Michigan and in Massachusetts in 1862. In general it might be said that if a measure submitted for popular ratification cannot receive the sanction of a fourth (25 per cent) of those voters who display some interest in elections, there is little reason for assuming that there is a public sentiment in favor of such legislation. Some such restriction may perhaps be desirable in some of our States.

There is another subject connected with the problem of percentages that deserves some consideration. In some of the States where the initiative and referendum have been called into operation measures repeatedly rejected by the voters by decided majorities have been resubmitted at each succeeding election, evidently with the hope that the proverbial fickleness of the populace would display itself in favor of the rejected measure. Thus fads and fancies of small groups repeatedly find their way to the ballot with monotonous regularity and seemingly with little chance of success. Recognizing the educative value of repeated submissions and recognizing also the right of the people to adopt fads in government if they so desire, it must be acknowledged that such submissions, when repeated year after

[13] Such a provision would not have defeated a single measure of the fifty-one constitutional amendments and statutes adopted by popular vote in Oregon during the period 1904–1914. For the votes see J. D. Barnett, *The Operation of the Initiative, Referendum and Recall in Oregon*, pp. 241–253.

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year with the same result, come to be nuisances; and the question arises whether it is not desirable to place limitations on the frequency of submission of the same proposition.

At the November (1915) election in Ohio one of the numerous measures submitted to popular vote was a constitutional amendment presumably designed to cure this evil. It provided, in substance, that a measure twice defeated since 1912 should not be subject to resubmission within a period of six years. It was heralded as a means of preserving the initiative and referendum, but evidently the voters suspected the particular brand of preservative for they overwhelmingly rejected the proposition. To prove their attachment to the principle involved the fathers of the measure immediately after the election made public announcement of their intention to re-submit the question at the earliest opportunity.

Notwithstanding such obviously insincere efforts to "safeguard" the initiative and referendum, the feeling is growing that some steps should be taken along this line. Oklahoma requires an unusually large petition of 25 per cent (the ordinary petition is only 5 per cent) to refer a measure within three years after its rejection by the voters. A more satisfactory method of accomplishing the same purpose might be found in a requirement that a proposition twice rejected by a decided majority should not be subject to resubmission for a period of three years, provided the vote, when submission was had, was large enough to be taken as a clear expression of public opinion.

A final problem involving percentages is presented by recent insistent demands for a shorter referendum ballot. In some States the number of measures submitted has grown to alarming proportions—a phenomenon attributed by many to the ease with which propositions may be placed on the ballot. The procedure usually requires that a petition for the reference of a question be signed by a certain proportion of the voters. Under the initiative, proposed constitutional amendments may be submitted by petition of from 5 per cent in South Dakota to 25 per cent in North Dakota. For statutes, petitions of 8 or 10 per cent are ordinarily required. In Ohio a petition of 3 per cent

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is all that is required to bring an initiated bill before the general assembly, but an additional 3 per cent must be obtained to force its submission when the legislature refuses to act favorably or amends. In Maine the petition must be signed by 12,000 voters.[14]

The referendum is usually invoked by a smaller percentage of the voters than is required for the initiation of measures. With the exception of the flat requirement of 10,000 signatures in Maine, all States prior to 1911 accepted 5 per cent as sufficient. Since 1911, however, the States adopting the initiative and referendum have provided for larger percentages. For instance, Ohio and Washington require 6 per cent of the voters to sign referendum petitions, while Nevada, Nebraska and North Dakota require 10 per cent. Most proposals now before the state legislatures indicate the same tendency to increase the size of the required petition.[15]

Whether the tendency to increase the difficulties of getting measures on the ballot is desirable depends largely upon the purpose the petition is intended to serve. As one writer of authority has expressed it, the petition should be designed merely to "express a second" to a proposition for a popular vote. If this is the correct view it is manifestly unnecessary to require a very large proportion of the voters to perform this function. On the other hand care must be taken to prevent flooding the ballot with a host of trivial matters, and this can be done by requiring a petition of sufficient size to insure some real demand for a vote. A careful study of past experience would seem to indicate that, save possibly in one or two States, the overcrowded referendum ballot has not been due to measures submitted by petition.

In most of the States that have adopted the initiative and referendum the population is sparse. In them a petition of 6 or 10

[14] See Beard and Shultz, *Documents of the Initiative, Referendum and Recall*, for detailed provisions in each of the States.

[15] It may be added that when provision is made for direct legislation in local government the percentages required for initiation or reference are almost invariably higher than for the State as a whole. If 10 per cent is deemed adequate for the State the local requirement is usually 15 per cent or more.

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per cent of the voters is not difficult to obtain. But this is not true in the larger States where a similar percentage would require an extra burden of labor and expense. Under the public opinion law of Illinois petitions of 10 per cent are required to submit state-wide questions. Even though the petitions are not verified experience has proved the procedure to be difficult.[16] In Ohio signatures are obtained without serious difficulty, but in this State the percentage required is somewhat lower than in other States that have adopted direct legislation within recent years. Since it is undoubtedly true that difficulty in obtaining signatures increases with the size of population it follows that, as direct legislation is extended to the more populous States, no sanctity should be placed in percentages that have been regarded as normally desirable in other communities. It would, in fact, seem more desirable not to require a definite proportion of the voters to sign petitions but rather to follow the Maine plan of fixing the exact number of requisite signers.

Little is to be said in favor of such requirements as are to be found in Montana where petitions must be signed by 8 per cent of the voters in at least two-fifths of the counties of the State; or in Missouri, where each of two-thirds of the congressional districts must furnish signatures of 8 per cent of its voters. Unfortunately such provisions are coming to be more common. The Nebraska amendment of 1912 requires 5 per cent in each of two-fifths of the counties and a total of at least 10 per cent of the voters of the State. The North Dakota amendment of 1914 is even more stringent in that it requires 10 per cent of the voters in a majority of the counties. The same idea was reduced to an absurdity in the proposed Idaho statute of 1914 which required for the initiative and referendum the signatures of 15 and 10 per cent of the voters respectively in "each and every county of the State." Thoughtful observers of the working of direct legislation are in agreement in pronouncing such

[16] In 1910 three questions were submitted in this State under the law above mentioned. The labor involved in obtaining the requisite number of signatures represented three months work at a cost of $7000 although 2800 volunteer workers were in the field.

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restrictions serious handicaps to the successful operation of the initiative and referendum machinery.

In conclusion it may be said that any immediate solution of the problem of percentages in direct government must be as far removed from the ideal as are existing conditions. Popular lawmaking should express public opinion with accuracy when such exists, and in doing so should perhaps reflect the consensus of a majority, or approximately a majority, of the voters. But in most of our States such a result is not attainable because of the character and disposition of the electorate. Under present conditions laws that do not reflect public opinion but rather the interests of special classes may occasionally be expected either with representative machinery or with direct voting. It is believed, however, that direct voting is, itself, gradually but surely reducing to a minimum the army of lethargic citizens and elevating the plane of political intelligence. If this continues the future will bring forth the time when "majority rule" will not only be possible but may be required in direct legislation.

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PROPER SAFEGUARDS FOR THE INITIATIVE AND REFERENDUM PETITION

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There is probably no problem in connection with the practical operation of the initiative and referendum on which opinions differ so widely as upon that of the proper safe-guarding of the petition. In every direct legislation State a petition is required to invoke either the initiative or the referendum; and in practically every State certain safeguards have been established either by constitutional provision[1] or by statutory enactment, to prevent the initiative petition from being prostituted by unscrupulous enemies of direct legislation or by those whose zealous advocacy of the initiative and referendum overbalances their judgment.

At the outset, there is one proposition upon which all fair-minded students of government will agree, namely, that if the initiative and referendum has been established in a state constitution as a part of the State's governmental machinery, its operation should not be impaired or destroyed by indirection. Let the enemies of direct legislation openly endeavor to abolish it by amending the constitution; but failing in this purpose, they should certainly not so hobble the initiative and referendum petition under the guise of safeguarding it, as to nullify the institution itself. The framework of government should not thus be made the victim of political tricksters. Accordingly any provision ostensibly to protect the petition from misuse, which in reality aims to prohibit its legitimate use, is utterly improper and unfit.

[1] For analysis of constitutional provisions, see *Index Digest of State Constitutions* published by the New York Constitutional Convention Commission, 1915, pp. 761–791.

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What, then, is the proper function of safeguards for the initiative and referendum petition? This inquiry compels another: What are the proper purposes of the initiative and of the referendum themselves? Two distinct answers to this question will be heard, inspired by two distinct schools of political thought. On the one hand, some will say that the purpose of the initiative and referendum is to educate the electorate in self-government to the fullest possible extent; to teach the voters that they are part and parcel of the government to which they pay tax tribute; that the laws under which they live and move are the creatures of their volition, not of a higher power to which they are subordinate. Reasoning along such lines, they will argue that it is desirable to have the greatest possible number of measures on the ballot at each election, and that the only proper safeguards for the petition are such as will prevent it from being tainted with forgery or fraud. Beyond these restrictions, the particular method of circulating the petition is immaterial. In other words, under this reasoning the only function of the petition is formally to bring initiated or referred measures before the people, meaning, of course, the voting population.

Another group insist that the initiative and referendum is but another check on representative government. Its function, under this view, is to prevent misrepresentation; to make possible the passage of laws which the legislature has refused to enact despite a public demand therefor, and to enable the voters to place their composite veto on measures which have been written on the books in defiance of the popular will. The education of the electorate in governmental action is an incident of the use of the initiative and referendum not its primary purpose; and the success of the initiative and referendum in any State is in inverse proportion to the number of initiated and referred measures. If few laws need be initiated and referred, the legislature is representing the electorate; and the initiative and referendum is accomplishing its highest purpose if it inspires in legislators a wholesome respect for the power of public opinion. Under this view, the petition is intended to represent the convictions of those who sign it; and any safeguard is proper which tends to prevent the

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petition from representing only a certain amount of blind industry, rather than the settled belief of a stated percentage of the electorate that a certain measure should be written on the books by the voters directly or nullified after its adoption by the legislature. It is appropriate to keep in mind these two points of view in examining and passing upon the propriety of the safeguards which have actually been established in various direct legislation States, or in suggesting new safeguards. An analysis of provisions to protect the petition shows that they may be conveniently separated into five groups as follows: (1) Safeguards to protect the petition-signer; (2) Measures to prevent fraudulent signatures; (3) Provisions to enable fraud to be detected; (4) Penalties to punish fraud; (5) Safeguards to prevent measures for which there is no real demand from appearing on the ballot. The safeguards falling under these group-headings will be taken up in order.

I. SAFEGUARDS TO PROTECT THE SIGNER

In practically every State an initiative petition is required to contain a full and correct copy of the text of the measure which forms its subject matter. Accordingly any voter whose signature is requested may, if he chooses, read the measure in order to know at first hand what it contains. With regard to referendum petitions, the voter is not so generally given the benefit of this precautionary requirement for the reason, perhaps, that measures passed by the legislature are assumed to be somewhat familiar to the public, and, in any event, they are of public record, and may be examined by those who persist in knowing their contents.

That the publication in the petition itself of the text either of a proposed initiative measure or of a referred legislative act is a proper safeguard will doubtless not be questioned under any theory of the function of the initiative and referendum.

A second provision for the benefit of the signer is the requirement that across the top of every *initiative* petition shall be printed in large black-face type the words: "*Initiative Measure*

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to be Submitted Directly to the People" or *"Initiative Measure to be Presented to the Legislature"* as the case may be. In only three States, California, Michigan, and Ohio, are distinctive petition-titles required for initiative petitions; and in no State is a distinctive title specified for use on a referendum petition.

To require the nature of the petition to be plainly declared in large type certainly appears to be quite a harmless provision, and it may perhaps serve to prevent the deception of unwary persons as to the purpose of the document presented for signature.

One other safeguard for the benefit of the signer is the constitutional requirement in Ohio,[2] that every circulator of a petition shall swear that the petitioners signed with knowledge of the contents of the petition, thus imposing on the circulator the duty of informing those whose signatures are sought of the exact nature of the measure which it contains. Ohio also permits what may be termed an optional safeguard for the signer. The proponents of any petition are allowed to present to the attorney-general of the State a short synopsis of the proposed or referred measure.[3] If the attorney-general approves the synopsis it may be printed in capital letters on the petition. The entire text of the law must also be presented though the petition contains a synopsis. It might indeed be well to require, not merely to permit, an approved synopsis of the measure which it contains to be printed on every petition.

Another provision of the Ohio law requires the petition to contain a statement signed by the circulator, showing how much he is to receive, or has received, for his services in circulating the petition.[4]

II. SAFEGUARDS TO PREVENT FRAUDULENT SIGNATURES

The selection of proper safeguards to prevent wholesale frauds in procuring signatures for initiative and referendum petitions has been the storm centre of violent controversy even among the most ardent friends of the initiative and referendum. That

[2] *Constitution of Ohio*, Art. II, Section 16.
[3] *1914 Laws of Ohio*, p. 119, Section 5175–29c.
[4] *Ibid.*, Section 5175–29g.

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fraudulent signatures have been discovered on petitions cannot be denied; and that fraud has been charged in connection with many other petitions is a fact which makes the safeguarding of the petition against fraudulent signatures an important problem.

In a celebrated Oregon case,[5] the highest tribunal of the State found that in order to procure the necessary petition to refer and delay an appropriation for the University of Oregon:

> The promoters were compelled to employ an attorney to secure the necessary signatures. This in itself was not an unusual course, as it is difficult to find citizens who are so devoted to their principles as to be willing to circulate such petitions without compensation. They employed Mr. Parkinson of Portland, who undertook to procure such signatures for 3½ cents a name. He employed a large number of circulators, who went forth into the highways and byways to procure signatures. Seven of these, at least, devised an easy method of earning their money. They would get together and pass their petitions around each signing a few names in a disguised hand, thus minimizing the chance of detection. These forgeries were clearly proved, mostly by the admissions of the parties. The petition as filed contained 13,715 names. Of these it is admitted that 3,778 are forgeries, perpetrated by dishonest circulators.

In 1912, both the secretary of state and the governor of Colorado called attention, in public documents,[6] to the prevalence of fraud in the circulation of initiative and referendum petitions.

Up to 1913, eleven measures were submitted to the voters of Oklahoma under the initiative and referendum. Fraud was charged in connection with the circulation of the petitions for eight of the eleven measures. Seven other measures were kept from the Oklahoma ballot during the same period of time because of the discovery of fraudulent signatures upon petitions which, in each case, appeared to contain the required number of names.[7]

Charges of fraud have also been made in California and other

[5] *State ex rel. v. Olcott*, 62 Oregon 277 (1912).

[6] The secretary's of state annual report, and the governor's message, respectively.

[7] See report of the secretary of state for 1912.

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States. It is evident therefore that something should be done to prevent these practices. Even though the percentage of petitions alleged to have contained fraudulent signatures is comparatively small, and even though only a small proportion of all the signatures on fraud-tainted petitions are actually unlawful, it is desirable if possible to prevent all fraudulent practices arising out of the preparation of the petition, whatever the theory which underlies the initiative and referendum. Even if the petition serves no other purpose than to indicate that a minimum amount of energy has been expended to procure names of the number established by law, the legal requirement should be honestly fulfilled; and it is obvious that if its purpose is to represent not merely the industry of the circulators, but the convictions of the signers as well, fraudulent practices wholly subvert its intended function.

Admitted that fraud should be eliminated, how can it be done?

Practically all the States provide that only qualified electors shall circulate petitions; but the moral fiber of the electorate is neither uniform nor without blemish; and this safeguard while eminently proper is evidently comparatively ineffective. Similarly some States require every signer to state that he is a qualified voter, and in most States an affidavit is required either by the circulator of the petition, one of the petitioners or a qualified elector, to the effect that the signatures are genuine to the best of the affiant's knowledge and belief, that they were made in his presence, and (sometimes) that the signers are electors to the best of his knowledge and belief. These again are absolutely appropriate protective requirements, but their efficacy is open to serious question. The sanctity of the oath seems to be becoming less and less in popular esteem, and it is therefore doubtful just how far these precautionary steps go in eliminating dishonest practices.

In a number of States a warning is printed on the outside page of every petition to the effect that every person who shall sign the petition with any other than his true name, or shall knowingly sign the same petition more than once, or who shall

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sign though he is not a legal voter, or otherwise violate the law relating to the signing of the petition shall be punished by fine or imprisonment. This again is a safeguard which all will doubtless acknowledge as absolutely proper. Its practical effect depends to some extent upon the penalty imposed on the law-breaker.

In addition to these precautions which are admittedly proper if effective, two States absolutely prohibit solicitation of names for pay, and one of them requires in addition, that all petitions be signed at the public offices for registration of voters, thus entirely doing away with the private circulation of petitions either by volunteers or for hire.

In South Dakota a statute enacted in 1913[8] requires every circulator of a petition to take an affidavit stating, among other things:

> That I have received no compensation whatever or promise of compensation for my services in circulating said petition.

The State of Washington has gone further than other State in its efforts to prevent the misuse of the petition. An act passed in 1915[9] over the governor's veto provides that initiative and referendum petitions may be deposited with the registration officer of any city, town or precinct. The registration officers are required to give receipts for any petitions left with them, and to display in a conspicuous place in the office, placards bearing the words: "*Initiative or Referendum Petitions may be Signed Here.*" Every registration office in which *referendum* petitions shall be left for signing is required to be open for that purpose each Friday and Saturday evening between the hours of six and nine, for ninety days following the adjournment of the legislature. If initiative petitions are left for signing, the

[8] *1913 Laws of South Dakota*, ch. 203, p. 277.

[9] *1915 Laws of Washington*, p. 186. Compare provisions in the Michigan Constitution of 1908 (Art. XVII, Sec.2) requiring petitions for constitutional amendments to be signed at regular registration or election places under the supervision of and verified by the officials thereof. These requirements were omitted in the amendment adopted in 1914.

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registration offices must be open Friday and Saturday evenings during ninety days preceding the time when the petitions must be filed with the secretary of state. Petitions may also be signed at any time when the offices are open for the registration of voters. It is the registration officer's duty always to have enough deputies on hand to accomodate voters desiring to sign petitions.

The procedure for signing a petition in the registrar's office is as follows:

If the applicant is not a registered voter, he must register in the manner provided by law before he may sign a petition. If he asserts that he is a registered voter, it is the duty of the registration officer to make such inquiries concerning the applicant's birthplace, age, occupation and place of residence as will identify him, and if the answers correspond with the information contained in the registration book, the officer must ascertain whether the applicant has previously signed the same petition. If not, he will be permitted to sign. The officer must then compare the signatures, and if the signature in the petition appears to be in the same handwriting as the signature on the registration book, the officer must enter upon the petition, opposite the signature, the residence-address, precinct-number, ward, and the name of the city or town of the voter as shown by the registration book. This being done, the officer must indorse the signature with his own initials in a space reserved for the purpose, and must also write on the petition the number given it by the secretary of state, when notice was given him, prior to the placing of petitions at the registration offices, that the particular measure would be initiated or referred.

If the signature on the petition does not correspond with the signature in the registration book, it is the officer's duty to refuse to initial and certify it.

When the proponents of the petition desire to retake possession of the various sections which have been left at the registration offices, they present their receipts for the same, whereupon the registration officers are required to draw red ink lines perpendicularly through all blank spaces for signatures, and to

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fill out certificates showing the number of initialed signatures on the petitions, and stating that they have complied with all the formalities required by law.

As a complement to this system of petition-signing, the same statute contains very drastic so-called corrupt practices features. It makes it a gross misdemeanor for any person: (1) to sign or decline to sign a petition for any consideration, compensation, gratuity, reward or thing of value or promise thereof; (2) to advertise in any newspaper or by any other means that he will solicit signatures, or influence, or induce, or attempt to influence or induce, persons to sign or not to sign any petition, whether the solicitation or influence is to be for or without pay; (3) to solicit, procure, or obtain, or attempt to procure or obtain, signatures upon any petition; (4) to pay, or offer to pay, any consideration of any sort to a person for signing or refusing to sign a petition, or for soliciting signatures, or to vote for or against an initiated or referred measure; (5) to interfere with, or attempt to interfere with, the right of any legal voter to sign or not to sign a petition, by any other corrupt means or practice or by threats or intimidation; (6) in, or within one hundred feet of, the entrance to any registration office to solicit or attempt to induce any person to sign or not to sign a petition; or (7) wilfully to violate any provisions of the statute.

The sum and substance of this law is, therefore, to prohibit entirely the circulation of petitions, and to require voters to go to the petition instead of having the petition brought to them. Does this system provide an effective safeguard against fraud and if so, is it proper?

That fraudulent signatures should be next to impossible under the Washington system seems obvious. In addition to this advantage, it is equally clear that there need be no complicated system of checking the validity of signatures after the filing of the petition. In some States which permit the circulation of petitions, a public officer is required to compare the signatures on the petition with the registration books after the petitions have been filed. In California, for example, this is done by the county clerk or registrar within twenty days after any section

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of the petition has been filed with him;[10] but it would evidently be much easier to perpetrate fraud under the California than under the Washington system. Indeed it is difficult to imagine a more effective safeguard than that provided by this latest innovation. On this point there can, it is submitted, be no conflict of opinion.

Is the Washington system a proper safeguard, or will it tend to destroy rather than to protect the usefulness of the initiative and referendum? In answer to this question there will be violent disagreement. On the one hand, it will be argued that unless voters are willing to go to the registration office to sign a petition, they evidently possess no conviction on the subject which warrants the submission of the measure to the voters. To this assertion the answer will be made that voters, however deep their convictions, will not go to registration places to sign petitions and that the Washington system will therefore virtually emasculate the initiative and referendum. Whether this is a theory or a fact will be seen after the Washington law has been in operation. If it is true, it is clear that the Washington system is not a proper safeguard under the first or educational theory of the function of the initiative and referendum.

Under either theory of the office of direct legislation, it will doubtless be found that the percentage of voters required to sign petitions should be somewhat reduced if the Washington plan is to be adopted. If 5 per cent of the voters is the proper number to sign a petition which is carried about by voluntary or paid circulators, 3 per cent would probably be ample if the signers must seek the petition. If the percentages be fairly adjusted on account of the added inconvenience to the signer, the Washington system certainly seems to afford the ideal safeguard if the ultimate purpose of the initiative and referendum is to check misrepresentative government.

On the question of prohibiting paid circulation in States which still allow petitions to be carried to the voter, there is also a pronounced difference of opinion.

[10] *Constitution of California*, Art IV, Section I.

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The facts bearing on this controversy between the adherents and the opponents of paid name solicitation are as follows:

1. Practically every petition upon which fraudulent names have been discovered has been circulated by paid solicitors. Indeed after extended investigation the writer knows of no instance in which fraudulent names have been found after their filing upon petitions circulated by volunteers.

2. The large majority of initiative and referendum petitions are circulated, in part at least, by paid circulators, who receive from three to fifteen cents the name. The persons hired for this work, as a general rule, beyond its financial return to them, have no interest in it. In some instances, however, where large organizations are back of the particular initiative or referendum movement, the paid circulators are recruited from the organization itself, and their only remuneration is an amount sufficient to compensate them for their loss of wages.

3. A number of petitions have been circulated wholly by volunteer work, and others have been circulated almost exclusively by this method, paid help being called in at the finish to procure a small number of signatures. Petitions which have been circulated by voluntary effort have in all but one or two instances contained measures which had been freely discussed by and before the public. Suffrage measures, liquor laws and amendments, and primary laws, seem to prevail. And it is alleged by those who know that it is next to impossible to procure sufficient names by voluntary effort for petitions containing less widely known measures, except perhaps measures which may properly be classified as "labor" or other legislation appealing to a large and influential class.

4. There appears to be no instance in which fraud has been charged in connection with the circulation of a petition wholly or largely by volunteer workers.

5. Those who are opposed to the paid circulation of petitions assert that in many instances the paid circulator resorts to every form of persuasion and often to misrepresentation to procure names. He insists that the voter's signature does not commit him to the measure or to its principles; it merely means that the

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signer is willing to have the question brought before the electorate, and it enriches the circulator by a few cents. Or, it is charged, the nature of the measure is explained to suit the taste of the circulator's victim, as the circulator has prejudged the signer's particular governmental or political leaning. Very few persons read the measures contained in petitions, and as a result signatures are often obtained on petitions to which the signers are unalterably opposed.

The facts given do not prove conclusively, of course, that paid petition circulating breeds fraud; it may have been only a coincidence, that the instances in which fraud has been found were petitions circulated by persons for hire. But it does seem clear that where the entire work of procuring the signatures necessary to secure a petition has been done by volunteer workers, the petition is much more likely to show a settled desire for or opposition to the initiated or referred measure than a petition completed by workers having no interest whatever in the measure itself. Certainly if the initiative and referendum are to be a governmental safety valve, or to use the President's simile, like the musket over the cabin door, to be taken down only in time of danger, it is desirable to encourage voluntary work in soliciting signers to petitions, and to discourage or even to prohibit circulation for pay.

If, on the other hand, the petition is a mere formality, why require a large number of meaningless signatures to be procured? Would it not be far better to require petitions to be signed by only a few voters and permit them to be filed upon the payment of a fee to the State equivalent to three or five cents for every name now required?

To illustrate: Suppose a chamber of commerce determines to initiate a "blue sky" law. There is no known public sentiment for the measure. It has never been before the legislature and few voters understand its meaning or its purpose. Its proponents, believe, however, that once the measure is initiated it will excite popular interest in all quarters. Twenty thousand names are required on the petition. The proponents of the measure realize that the necessary names will not be procured by volun-

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teers. They advertise for circulators at three cents the name. There are many applicants, and in five days the petition is complete at a cost of $600. Evidently the petition is not the spontaneous expression of 20,000 voters that their legislature has misrepresented them; and if petitions are to be allowed under such circumstances, why not allow them to be filed upon the payment of the State of a substantial fee, discounted perhaps, according to the number of signatures which have been procured by volunteer circulators? The result would be the same as that obtained under the present method, at the same time that there would be less trouble and expense to the sponsors of the initiative or referendum campaign, and no inducement whatever to the perpetration of fraudulent practices. Fees thus paid to the State could be used to defray *pro tanto* the expenses of giving proper publicity to the measures placed upon the ballot.

Ohio follows what was probably intended as a middle course on the question of paid circulation. Every circulator is required to state on the petition over his signature, exactly what he is to receive for his services. To this requirement, it will be difficult for anyone to take exception.

To summarize, it appears that proper safeguards to prevent fraudulent practices in connection with the procurement of signatures depend upon which theory of the function of the initiative and referendum we accept.

If direct legislation is to be merely a specific for non-representation or misrepresentation, the petition should bespeak the convictions of its signers. It should be prepared without the artificial stimulus of the professional name procurer, or, perhaps, it should be signed at the registration place under the direct supervision of public officials. In this event, and also if solicitation of names for pay be forbidden, the number of names required should be fixed with due regard to the purpose of the initiative and referendum, and in such a way as to promote and not to destroy its usefulness. Existing percentages in direct legislation States would be, generally speaking, too high.

If, on the other hand, the initiative and referendum is primarily a great educative institution, the petition is a mere

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matter of form. It does not necessarily represent anything, but is intended to prevent the ballot from being literally swamped with measures. This being so, any deterrent will serve just as well as the requirement that each petition contain a huge array of names. A fee for filing the petition, large enough to prevent the excessive submission of measures would eliminate the fraudulent practices now alleged to be in vogue, and would assist in paying the expenses incident to the proper operation of direct legislation.

III. SAFEGUARDS TO ENABLE FRAUD TO BE DETECTED

In States which allow petitions to be circulated among the voters, it is usual to require each signer to give certain information with his signature which will make possible the detection of fraud by the public officer charged with the duty of checking up the petition. The signer is usually required to state his residence, giving street and number, if any. In some States he must also give the date of signing and the ward and election precinct in which he lives.

Any such safeguards are eminently proper under any theory of the purpose of the initiative and referendum.

In most States petitions need not be compared with the registration lists; the secretary of state is merely required to ascertain if a petition contains the requisite number of qualified voters. This is not the case in California and Ohio where the county clerk or registrar is required carefully to examine any sections of a petition circulated in his county with a view to the discovery of any fraudulent signatures.[11] To make such an examination possible, the California constitution further provides that no section of a petition may be circulated in more than one county, and that all the sections circulated in any one county must be filed with the county clerk or registrar. An Ohio statute establishes practically the same system.[12]

[11] *Constitution of California*, Art. IV, Section 1; *Laws of Ohio, 1914–1915*, p. 295, Gen. Code, Section 5175–29i.

[12] Ibid.

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The California and Ohio safeguards seem above criticism; their only result if properly administered will be to preserve the integrity and honesty of the petition.

IV. MEASURES TO PUNISH FRAUD

In a number of States besides Washington stringent corrupt practices acts and constitutional provisions are in force, applying to the circulation of initiative and referendum petitions. In New Mexico the constitution makes it a felony to abuse the petition in any one of several ways.[13] The Ohio legislature in 1914 enacted the most recent corrupt practices statute applying to petitions.[14] It inflicts a severe penalty upon any person who directly or indirectly:

(1) Misrepresents the contents of a petition;
(2) Pays or offers to pay any voter for signing a petition;
(3) Promises to help another to obtain appointment to office as a consideration for obtaining signatures to a petition;
(4) Obtains signatures on the strength of a promise of the above type;
(5) Alters in any way a petition after it has been filed;
(6) Fails to file an itemized statement within twenty days after he has filed a petition showing:
(a) All moneys paid for circulating the petition,
(b) Names and addresses of persons to whom payments are made,
(c) Names and addresses of persons who contributed to the fund to pay for circulating the petition,
(d) The time spent and salaries earned while circulating or soliciting signatures to petitions by persons who were excused from their regular employment by their employers so that they might procure names,

It is beyond dispute that the severest penalty consonant with modern thought is not too harsh for the person who violates the sanctity of the ballot or who attempts to abuse any part of our duly constituted governmental machinery; and every direct legislation State should therefore throw around the initiative and referendum petition, the protection of corrupt practices provisions such as those now in force in Ohio.

[13] *Constitution of New Mexico*, Art. IV, Section 1.
[14] *1914 Laws of Ohio*, p. 119; cf. *Laws*, 1914–1915, pp. 295, 443.

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V. SAFEGUARDS TO PROTECT THE ELECTORATE AGAINST THE PETITION

There is one other class of safeguards to be discussed. Certain measures are necessary to prevent the initiative and referendum from being overworked. The preventive most frequently suggested is the elimination of paid name solicitation. This has already been discussed, under another heading. Unquestionably to compel every petition to be completed exclusively by volunteer effort, will result in fewer initiated and referred measures. If the percentage of required signatures is properly adjusted so as not to render the use of the reserved powers impossible in appropriate cases, many persons would welcome such a result. To others it seems desirable to place the least possible restriction on the initiation or reference of measures. They therefore object strenuously to the prohibition of paid name getting merely to restrict the free exercise of direct legislative powers.

Another safeguard exists in quite a few States in the shape of a requirement that the stated percentage of signers be procured in a given number of counties or congressional districts. For example, in Missouri an initiative petition must bear the signatures of 8 per cent of the voting population, and included in the 8 per cent there must be 8 per cent of the voters in two-thirds of the congressional districts of the State.[15] Somewhat similar provisions are contained in the constitutions of Montana,[16] Nebraska,[17] Ohio,[18] and North Dakota.[19] The purpose of this requirement is to prevent measures from appearing on the ballot which are of interest to only a small section of the State, which may, however, be able to supply a petition containing the requisite number of signers. If this restriction renders it practically impossible to procure the necessary number of signers to any petition, it is obviously not a safeguard but a barrier, and is

[15] *Constitution*, Article IV, Section 57.
[16] *Constitution*, Article V, Section 1.
[17] *Constitution*, Article III, Section 1 A.
[18] *Constitution*, Article II, Section 1 B.
[19] *Constitution*, Article II, Section 25.

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improper. This is certainly true of the provision of the New Mexico constitution requiring not less than 10 per cent of the voters of each of three-fourths of the counties of the State to sign petitions.[20] If, however, the number of districts through which the petition must be circulated is reasonably small, let us say not more than one-half of the State's territory, it seems quite proper to require that the petition give evidence of more than an entirely local interest in the proposed or referred measure. Some of those most interested in the success of direct legislation have expressed themselves to the writer as not opposed to this safeguard.

In conclusion it is evident that the present tendency is to increase the safeguards surrounding the initiative and referendum petition, especially in so far as the prevention of fraudulent signatures is concerned. This tendency is highly commendable if honestly conceived and properly tempered with practical judgment. If the people of a State have no further use for the initiative and referendum, they should abolish it; and, of course, if a majority of the electorate desire direct legislation to be retained but shackled, they are within their prerogative. But a few office holders have no right to assume to restrict the usefulness of these institutions by requiring unfair and impossible formalities in connection with the circulation of petitions.

The recent legislation in Ohio appears to be unobjectionable, and intended only to prevent improper practices. The Washington legislation, on the other hand, seems too strictly to confine the usefulness of direct legislation. Its theory may be correct, but practically it seems very doubtful whether 10 per cent of the State's voters will ever go to the registration places to sign an initiative petition or 6 per cent a referendum petition.

[20] *Constitution*, Article IV, Section 1.

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RECENT EXPERIENCE WITH THE INITIATIVE AND REFERENDUM

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The more intensively one tries to study the interesting phenomena of direct legislation the more humble does he become. To look closely, for example, at the two hundred and ninety-one constitutional and legislative measures which the people of thirty-two States voted upon in 1914 is to be impressed with the number and significance of the things about that remarkable election which one cannot possibly know. How superficial at best must be our insight into that complex of social, political, economic and human forces which lay back of the presentation of those measures and the popular decision upon them. It is in full realization of the peril which lies in the way of sweeping classifications and glib generalizations that the conclusions drawn in the course of this brief discussion of the recent experience with the initiative and referendum petition are offered with considerable hesitancy.

I

There is an aspect of recent experience with direct legislation however, which may be analyzed with more or less accuracy. We can determine the extent to which initiative and referendum petitions are being used and it is apparent that the number of proposals thus submitted by popular action is increasing. Twenty-seven more initiative and referendum measures were presented to the people in 1914 than in 1912. This means however, a broader geographical application of direct legislation rather than a general increase in the average number of laws submitted in the individual States. The Oregon ballot of 1912 still holds the record in presenting the largest number of initiated or re-

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ferred laws which ever confronted the voters of a single State in one election. On the other hand the circulator of petitions seems nowhere to be growing weary of his task and in some States is more energetic than ever.

Critics of the system have long declared that direct legislation would rob the state legislator of his dignity and destroy his sense of responsibility to the people. He would become a mere automaton and the important work of legislation would be carried on at the polls. Needless to say no such complete emasculation of state law-making bodies has anywhere occurred. The legislators in Oregon, Washington or California still grind out laws with as great rapidity and steadiness as though they were paid for their statesmanlike labors by the piece instead of by the day. It is nevertheless a matter of some concern that in the larger direct legislation States there is a tendency on the part of the legislature to submit an ever increasing number of proposals to the people for ratification. Twenty-two of the forty-eight measures presented to the people of California in 1914 and nine of the eleven presented in 1915 were placed on the ballot by the legislature itself while the legislators of the other initiative and referendum States were only slightly less active in this way. The legislature must, of course, refer its proposed constitutional amendments to popular vote, but its willingness to refer numerous statutes in addition would seem to indicate a readiness to share its burdens and responsibilities. The state legislator is certainly not jealous of any competition which may arise in the field of law-making.

It may perhaps be interesting to note that the initiator of laws continues to be much more energetic on the whole than the reformer who utilizes the referendum. This is strikingly apparent in Oregon where the simple and direct expedient of writing one's own law is vastly more popular than the more uncertain process of lobbying it through the legislature. There is also a slight tendency to increase the number of constitutional amendments submitted by initiative petition as compared with the statutes initiated or referred. This practice of inserting into the constitution detailed provisions which ought to be enacted

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in the form of statutes is much to be deplored. It is small consolation moreover, to reflect that the process bids fair to continue, in part at least, by reason of its own momentum since detailed administrative provisions in a state constitution can be changed to meet new conditions only by means of other constitutional amendments.

There is recently discernible a marked increase in the practice of repeatedly submitting by means of initiative petition measures which have previously been defeated by the people. It will be recalled that woman suffrage was three times rejected at the polls before it was finally adopted by the voters of Oregon. In 1914 a dozen previously rejected measures were again presented to the people, while in the November election of 1915 two of these measures reappeared in California and two in Ohio. Ohio, in fact, has had a very curious experience with those proposals which like Banquo's ghost will not down. Seven times since 1912 have the voters of that State been called upon to repeat their decisions regarding measures presented to them. A statewide policy in regard to the liquor traffic has been before the Ohio voters in the last four elections. This practice of persistently submitting the same question is severely criticized on the ground that a measure which a majority of the voters disapprove may finally win by default as it were merely because its opponents have grown weary of the monotonous task of voting it down. On the other hand the proponents of woman suffrage and prohibition, the most common legislative perennials, feel that in no other way can they so effectively carry on their educational campaigns as by continually placing their proposals upon the ballot. They regard perseverance in this direction as a cardinal virtue. Whatever the merits of the controversy may be, there is a strong body of opinion in favor of requiring an interval of six or eight years to intervene before a defeated measure may be submitted to popular vote a second time.

There are some interesting recent developments in the direct legislation States relating to the use of emergency clauses under which measures of immediate importance to the health, safety and welfare of the State are permitted to go into effect without

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the ordinary delay which makes possible the filing of a referendum petition. The friends of direct legislation have jealously watched the extent to which the state legislatures have made use of these emergency clauses for the purpose of preventing laws from being referred to the people. In 1912 Oregon adopted a constitutional amendment forbidding the declaring of an emergency in cases of taxation and exemption. Another curb on the possible abuse of the emergency clause has lain in the power of the governor to veto either the entire bill or merely the section of it in which the emergency is declared. This partial veto of the governor was used for this purpose four times during the 1915 session of the Washington state legislature. During the last year still another protection against the abuse by the legislature of the emergency clause has come into prominence. This is the determination by the supreme court of Washington in the case of State *ex rel* Brislawn v. Meath (147 Pac. 11, May, 1915) followed in three subsequent cases, that whether or not an emergency actually exists which should exempt a statute from the operation of the referendum is a question which the courts will examine and settle. This doctrine is in direct conflict with that announced by the supreme court of Oregon in 1903 in the case of Kadderly v. The city of Portland (44 Ore. 118), and it permits any interested citizen to resort to the courts if he feels that the legislature has abused its power in declaring an emergency. An examination of the session laws of Oregon and Washington for the last two legislative sessions does not, however, disclose any noticeable tendency toward a wholesale and unwarranted use of the emergency power.

II

A brief consideration may be given to the classes who at present are using the initiative and referendum petition. It is perhaps natural that a more or less steady popular rejection of their schemes should somewhat dampen the enthusiasm of those ardent spirits who believe that every hardship or injustice to which mankind falls heir can be alleviated by the enactment of statutes of a millennial type. A glance at the recent ballots from the

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Pacific States reveals a marked abatement in the zeal of the Utopian reformer. Towns and communities which, a few years ago, preferred to urge their local needs and desires through the ballot rather than before the state legislature are showing much less zeal in the circulation of initiative and referendum petitions. The spectacular legislative duel fought in 1908 between the Oregon fishermen of the upper Columbia and those of the lower Columbia has not been duplicated in recent elections. Certain well defined classes or groups, however, continue successfully to propose legislation in their own behalf. A striking illustration is the labor interests who have consistently used the initiative and referendum petition and have secured the enactment of many progressive laws. As we have already seen friends and enemies of woman suffrage and prohibition, where their battles are not already permanently won, display an unabated zeal in the circulation of petitions. There is at least one marked example of the use of the referendum for a partisan end. In November, 1915, the alleged Republican "gerrymander" act was, largely through the efforts of the Democratic party in the State, referred to the people of Ohio and was defeated. Although the measure was perhaps open to general criticism, the contest in regard to it seems to have been staged and fought out primarily on party lines.

The system of direct legislation has acquired a certain respectability even in the minds of its critics by reason of the fact that it has persisted and spread. It is but natural, therefore, that groups in the community which a few years ago regarded the initiative and referendum with open hostility and scorn are beginning somewhat cautiously to explore and utilize its resources. Thus we have presented the somewhat anomalous picture of a group of political conservatives seeking to restrict the scope and operation of the initiative and referendum by means of the initiative petition itself. Many students of direct legislation would be glad to see an increase in the number of petition signers necessary to put a measure on the ballot, an increase in the size of the majority necessary to adopt certain kinds of proposals, or a restriction upon the re-submission of defeated measures. Half

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a dozen or so such measures have been submitted under the initiative in the last few years. The voter in the direct legislation States, however, seems to regard them with the same degree of friendliness with which he would view a proposal for his own disfranchisement. On the whole it may be safely stated that there is recently noticeable a tendency on the part of an ever increasing number of groups and classes to avail themselves of whatever benefits the system of direct legislation has for them.

III

Brief comment may well be made on the type of proposal which has recently been presented to the people through the initiative and referendum petition. When the system of direct legislation was quite new in this country the measures which appeared upon the ballot, when they rose to the dignity of state-wide interest, dealt most frequently with problems essentially political. Laws and amendments of political import are still presented in considerable number. One cannot fail to be impressed, however, with the rapidity and decisiveness with which that emphasis is being shifted. The political reformer is resting from his labor and in his place stands the man who demands social and economic readjustment. Perhaps it is more accurate to say that the political reformer, having accomplished most of his ambitions, has now turned his attention to these deeper and more difficult problems of community welfare. Thus where the people were voting upon proposals for direct primaries a few years ago, today they are solving the problems of minimum wage and social insurance.

It is encouraging to note that measures of trivial importance and local concern are less and less frequently submitted to popular vote. They have become the exception rather than the rule. It looks as though the day might even now be in sight when the voters of a populous State will cease entirely to be confronted with the problem whether fish may be taken from Rogue River with a hook and line or what courses of study shall be pursued at the state normal school.

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There is one respect, however, in which the character of the measures which are now being presented by the initiative and referendum petition gives less cause for rejoicing. We are in a period of administrative reorganization and adjustment. The result is that the ballot in the direct legislation States is being crowded with elaborate proposals of a highly technical character. They are not matters of slight importance or local concern. It is of great moment to the voters of any State how public service companies shall be regulated and by what process land may be condemned for public use. But to submit these matters to popular vote is to strain the interest and intelligence of the citizen and invite the most haphazard results in the way of legislation. Surely if the debate, discussion, compromise and amendment which take place in legislative chambers and committee-rooms are needed anywhere they are needed in the drafting of these elaborate measures. But there seems to be an increasing readiness on the part of state legislatures and petition circulators to refer this kind of proposal to direct vote of the people. Of course whenever these highly technical provisions are written into the state constitution a vicious circle is started since such provisions will usually demand or be thought to demand frequent readjustment and change possible only through repeated popular votes. This aspect of the problem, however, does not seem to cause serious concern in the direct legislation States, and Arizona has recently created this same vicious circle in the making of statute-law by providing through constitutional amendment that laws enacted by the initiative or referendum shall not be voted, or amended or repealed by the legislature. Thoughtful critics of direct legislation cannot but regret that a tendency so hostile to the efficient and careful enactment of law continues to prevail and increase.

We have seen that the initiative and referendum petitions are being used more frequently, by an ever widening circle of groups and classes, for purposes vitally affecting the welfare of the community and in ways which directly concern the efficiency of the state government. Direct legislation is a growing, not a diminishing phenomenon. It presents a problem ever more complex,

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ever more important. The feeling that it is always open season upon every phase of the initiative and referendum is passing away. It is not unreasonable to expect that unimpassioned and critical study of the system, in the light of a constantly lengthening and broadening experience will make apparent those readjustments which may be necessary to make the initiative and referendum petition a more accurate, more reliable, more efficient governmental device.

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SAFEGUARDING THE PETITION IN THE INITIATIVE AND THE REFERENDUM

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As Ohio's first experience with the statewide initiative and referendum drew attention of students of direct legislation from all parts of the country and led to carefully worked out legislation for safeguarding petitions, I shall confine my attention in this discussion to the operation of safeguards in that State. The initiative and referendum were established by constitutional amendment in 1912. The amendment provides that only electors of the State are entitled to sign petitions, that each person must sign for himself, and that each part petition must contain an affidavit of the canvasser, stating that each of the signatures on such part was made in the presence of the affiant, that to the best of his knowledge and belief each signature is a genuine signature of the person whose name it purports to be, that he believes the persons who have signed it to be electors, and that they signed the petition with knowledge of its contents. The legislature in its first session following the adoption of the amendment passed a law prohibiting the giving or receiving of money for signing petitions, and requiring the circulators of petitions to file with the secretary of state, after election, a detailed statement of receipts and expenditures, with names and addresses of contributors and of persons receiving pay for circulating petitions, with amounts contributed or received by each. Neither the constitution nor the statute established further practical means to facilitate the prevention or detection of fraudulent practices in making or soliciting signatures.

The need for adequate means for safeguarding petitions was clearly demonstrated in the State's first experience with the referendum in 1913. In that year petitions were circulated for

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the initiation of one constitutional amendment and of one law, and for a referendum upon three of the acts passed by the legislature of 1913. Two of these acts were among the most important achievements of the extensive program of social and administrative legislation enacted by the Democratic legislature of 1913, under the guidance of Governor Cox. These two acts were, first, an act establishing compulsory workmen's compensation through a system of state insurance, and, second, an act substituting centrally appointed for locally elected tax assessors. The time limits of this discussion make it impossible to review the political and legal questions involved in connection with the hearing upon the sufficiency of the petitions submitted against these laws. The hearing was held by the secretary of state under the direction of the governor. The chief agency in the circulation of petitions was the Ohio Equity Association, an organization representing certain industrial insurance companies and formed for the purpose of securing the reference and defeat of the laws mentioned above. The association was accused by the governor of being directly concerned in the fraudulent and reckless practices pursued by the actual circulators of petitions. On the other hand, the governor and secretary of state were accused of using the powers of their offices to forestall arbitrarily at any cost the referendum. The governor's motive was considered to be determined by his fear of the test of a popular referendum upon the acts, and in his desire to secure at all costs the power that would result from the extensive patronage conferred upon him by the tax-assessor law.

The hearing disclosed that in circulating petitions for the referendum on the three acts, practically every constitutional and statutory requirement affecting petitions was deliberately and repeatedly violated or ignored. Men of low character and intellect, including some loafers and ex-convicts, were employed as solicitors and were enjoined to secure names upon the petitions in any way they could. Many signatures were obtained from persons known to the solicitors not to be electors; many signatures were known to the solicitors not to be genuine signatures of persons whose names they purported to be; long lists of names

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were written in by circulators, copying from city and telephone directories, hotel registers, poll lists, street signs; there thus appeared upon some petitions the names of non-residents, dead men, and inmates of the penitentiary; some circulators testified that they made up lists "out of their heads." One solicitor testified that out of 7020 names secured by him not one was genuine. Some petitions were left in saloons to be signed indiscriminately; a drink or the price of a drink was sometimes given by a circulator in order to obtain a signature; some solicitors obtained signatures by misrepresenting the contents of the petition, by stating, for example, that it was a petition for the benefit of working men or to secure increased pensions. Other abuses were disclosed in connection with the attestations by notaries public to the affidavits required to be made by the solicitor and attached to each part petition. It was established that some notaries neglected to swear the solicitors or would swear them by proxy; others would swear the solicitors when they, the notaries, had good reason to believe that names on the petitions were forgeries. It is not necessary to assume that the officers of the Ohio Equity Association were themselves positively responsible for methods pursued by circulators employed by agents of the association.

In the investigation the attorney general ruled that where evidence proved that a solicitor had wilfully sworn to a false affidavit as to the genuineness of any signature on a part petition, or that the affidavit was not in fact sworn to as required by law, all of the signatures on such part petition should be thrown out, as the false affidavit or the illegal swearing or failure to swear made the whole petition a nullity. As a result of the secretary of state's decisions in the hearing the number of signatures adjudged by him to be valid was far short of the constitutional requirement. The secretary of the Ohio Equity Association applied to the supreme court for a mandamus to be directed against the secretary of state to compel him to place the laws upon the ballots. The court refused to issue the writ, upholding the attorney general's ruling that the secretary of state, as state supervisor of elections, has authority to hear and

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determine the sufficiency and validity of petitions filed with him, and that his decision thereon is final, unless such decision has been fraudulently or corruptly made, or unless he has been guilty of an abuse of discretion; and sustaining also the attorney general's ruling that a false affidavit or an imperfect swearing by the notary invalidated all signatures upon the part petition in question. This decision was rendered by a vote of five to one, the one dissenting judge being the sole Republican judge on the supreme bench.

In preparation for the special legislative session of 1914, attention of the governor, secretary of state, and the legislative reference bureau, was directed to the problem of securing a law which would provide the necessary safeguards for preventing a repetition of the frauds that appeared in 1913. Suggestions from advocates of direct legislation in all parts of the country were secured. After careful consideration of their suggestions a law was framed and passed incorporating certain of their recommendations. The new features in this law relate chiefly to the form and arrangement of the petition blanks, to provision for local examination of the signatures, to the requirement that the statement of receipts and expenditures by circulators of petitions be filed before elections instead of after elections—as provided in the law of 1913; and to the extension of penalties, by providing penalties for practices not previously punishable at law, and by increasing penalties for acts already punishable. The law provides that the general form and arrangement of petitions shall be regulated by the secretary of state, but must conform to the following requirements: (1) At the top of each part of the petition the following words shall be printed in red: "NOTICE: —Whoever knowingly signs this petition more than once, signs a name other than his own or signs when not a legal voter, is liable to prosecution;" (2) following this notice may appear a synopsis of the contents of the law or amendment, certified to by the attorney general as a truthful statement of the contents; (3) following the signatures there must appear a statement by the solicitor of whatever of value he has received or expects to receive in consideration for his services in soliciting signatures;

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(4) at the end of each part petition the text of the law is printed in full. The warning in red at the top of petition is expected to put the solicitor or prospective signer on guard against reckless conduct in soliciting or giving signatures. To establish a preliminary local examination it is provided that each part petition shall contain names from only one county, that such parts shall be transmitted by the secretary of state to the respective county boards of elections to be kept on file with them and open for public inspection for a period of not over fifteen days; the local boards are required to make general scrutiny for illegal signatures or for omissions of any of the requirements of law respecting petitions; they were required to report their findings to the secretary of state who was required to give judicial notice of any hearings he might hold and was given power to subpoena witnesses, compel testimony and administer oaths. Various acts have been made corrupt practices—such as the willful misrepresentation of the contents of a petition, payments of money or assistance in securing appointment to office given to any one for signing the petition, failure to file truthful statements, as required by law. Other acts have been made punishable, such as signing a petition more than once, signing when not a legal voter, signing a name other than one's own.

There were no significant revelations or charges of fraud in connection with the initiative petitions of 1914. The Republican legislature of 1915 however has modified the law safeguarding petitions in one important particular. Under this law final power is given to local tribunals in decision upon the validity and sufficiency of petitions, such power being withdrawn from the secretary of state. This law provides that if a county board of elections find any signature insufficient it shall, after notifying persons concerned in the solicitation of said signatures, proceed to establish the insufficiency of such petitions before the court of common pleas of such county, which action shall be heard forthwith by the court, whose decision shall be final. The county board shall then return the petition to the secretary of state, with a certification of the total number of sufficient signatures thereon. The number so certified shall be used by the secretary of state

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in determining the total number of signatures, which he shall record and announce. The signatures as certified by the county boards are made in all respects sufficient.

Again in 1915, in connection with the petitions for two referred laws and four initiated constitutional amendments, there appears to have been no serious suspicion of fraud. Perhaps the chief explanation for the purity of the petitions in the last two years is to be found in the watchfulness produced by the notoriety of the hearings of 1913. But legal safeguards of the laws of 1914 and 1915 doubtless contributed in important ways to the clear record for the petitions of these years. In the writer's opinion the most beneficial of these safeguards are the following: first, the provision for local examination and, under the 1915 law, local determination of the genuineness of signatures and of general compliance with the law; second, the provision for a certified synopsis of the contents of the law to be printed on each part petition, and for the warning in red at the top; third, the requirement that the statement of receipts and expenditures by the circulators be filed and opened to public inspection before election.

Time will not permit any discussion of the operation of these requirements. In conclusion, there appears at present to be no strong feeling of need for further regulation. In particular there seems to be no general demand that payment to circulators of petitions be prohibited, or that petitions be deposited for signatures in central places and the circulation of petitions be prohibited.

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LEGISLATIVE NOTES AND REVIEWS

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Legislative Investigations. The number of legislative investigations authorized by the general assemblies of 1914 and 1915 was extensive. In addition to the summarized list given in the REVIEW for November, 1915, the following investigations, undertaken to obtain information on which to base prospective legislation, were authorized.

Alabama. A joint committee consisting of five members of the house and three members of the senate was authorized to sit during the recess of the general assembly to investigate every state department, board, bureau and commission to ascertain the character and purpose of all disbursements; the amount of all annually accruing interest on the bonded, floating or other indebtedness; "any abuse, waste, or improper use of public funds or property;" and the method of supplying adopted school textbooks, including the contracts of the state textbook commission and desirable methods of securing "more efficient and economical methods of procuring a uniform system of textbooks for use in the schools."[1] A commission on adult illiteracy consisting of five persons, one of whom is the superintendent of public instruction, was created to ascertain the true conditions of the State in regard to its adult illiteracy.[2] A second commission consisting of the governor, the chief justice of the supreme court, the presiding judge of the court of appeals, the attorney-general and the director of the department of archives and history was created to investigate the subjects of workmen's compensation, registration and insurance of land titles, penitentiary and criminal administration, conservation of the natural resources of the State and such other subjects as the commission may consider worthy of investigation.[3]

Arizona. Arizona authorized the commissioner of the state land department to conduct investigations on the state lands to determine their availability for agricultural purposes, grazing and development of

[1] Session Laws, 1915, 207.
[2] Session Laws, 1915, 80.
[3] Session Laws, 1915, 944.

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water power,[4] and appropriated $4000 to pay for the underflow water investigations previously authorized.[5]

Arkansas. Arkansas created eleven legislative committees, consisting of a designated number of senators and representatives, appointed by the presiding officers of the respective houses, to investigate the financial and administrative affairs of the state university,[6] the state normal school,[7] the branch normal at Pine Bluff,[8] the tuberculosis sanatorium,[9] the four agricultural schools,[10] all state departments and institutions,[11] the governor's proposed revenue plan,[12] and the state hospital for nervous diseases including the actions of the state board of charities.[13] A commission for the feeble-minded was created to investigate the conditions and needs of the feeble-minded.[14] To insure publicity of these investigations, it is provided that the report of the committee to investigate the state departments and institutions shall be sent to each newspaper in the State for publication.[15]

California. California created a commission to investigate the various systems of social insurance in operation,[16] authorized the printing of 5000 copies of the report of the recreational inquiry committee[17] and provided for the investigation of the question of free textbooks in the secondary schools.[18]

Colorado. Colorado provided for a special committee on the public welfare, consisting of two hold-over senators and three representatives to investigate the undue influence of public officials in the enactment of laws and ordinances. Two other legislative committees were provided for: one to inspect the educational, penal, reformatory and charitable institutions of the State to ascertain their financial needs and the other to study all state institutions, boards and commissions and report.[19]

Delaware. Delaware provided for a committee of senators and representatives to audit the accounts of all state offices and departments and report the condition of the financial affairs of the State to the general assembly of 1917, and a second committee was provided for to investigate the action of the child labor commission.[20]

[4] Second Special Session, 1915, 44.
[5] Laws, 1st Special Session, 1915, 38.
[6] Laws, 1915, 1494.
[7] Laws, 1915, 1494.
[8] Laws, 1915, 1495.
[9] Laws, 1915, 1495.
[10] Laws, 1915, 1496, 1485.
[11] Laws, 1915, 1483, 1487.
[12] Laws, 1915, 1484.
[13] Laws, 1915, 1484, 1489.
[14] Laws, 1915, 1500.
[15] Laws, 1915, 1499.
[16] Laws, 1915, 473.
[17] Laws, 1915, 1801.
[18] Laws, 1915, 1916.
[19] Laws, 1915, 598, 609, 459.
[20] Laws, 1915, 707, 717.

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Florida. Florida provided for the appointment of a legislative committee to investigate all state farms and hospitals. Two special commissions were provided for: one to investigate the question of mothers' pensions, and a second to investigate the needs of the institutions for the care of the indigent, epileptic and feeble-minded.[21]

Georgia. Georgia appointed a committee of nine representatives and three senators to investigate the state school for the deaf and report their findings to the next general assembly.[22]

Illinois. In Illinois a mine investigating commission was continued, consisting of three coal mine operators, three coal miners and three other persons to recommend changes in the mining laws.[23]

Kansas. In Kansas, the attorney-general was authorized to investigate the bridge companies of the State to determine whether they are violating the anti-trust laws by dividing up the territory and to ascertain whether the several boards of county commissioners are expending the bridge funds legitimately. A legislative committee was also appointed to investigate the business management of the state offices and institutions, including the number and duties of employees and the efficiency and economy of operation.[24]

Maine. Maine provided for the appointment of a commission of three practical men to investigate the question of the destruction of dog fish and other members of the shark family and report a plan to the next legislature.[25]

Maryland. Maryland provided for the creation of a commission to effect a survey of all public schools, normal schools, elementary and secondary schools, academies, colleges, agricultural and professional schools receiving state aid.[26] A commission was created to investigate and report plans and measures for the protection of the lives and health of miners; a commission to confer with a like commission of Virginia to formulate and report a bill to regulate the fishing industries along the boundaries of the two States; and a third commission to report on the development of the resources of southern Maryland.[27]

Massachusetts. Massachusetts created a commission consisting of the attorney-general, the board of gas and electric light commissioners, the public light commissioners and the public service commission to investigate the feasibility of placing the business of supplying ice under

[21] Laws, 1915, 501, 250, 263.
[22] Laws, 1915, 999.
[23] Laws, 1915, 80.
[24] Laws, 1915, 486, 497.
[25] Laws, 1915, 263.
[26] Laws, 1914, 1650.
[27] Laws, 1914, 742, 1761, 1751.

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state supervision and control and to permit electric light and power companies to engage in the business of manufacturing and selling ice.[28] The board of commissioners of fisheries and game was directed to continue the investigation of the fish and fisheries of Buzzards Bay as provided in 1913.[29] The commission for the blind was authorized to expend $1500 in the study of problems of defective eyesight and of doing the work of vocational guidance in certain cases.[30] The board of education was directed to investigate the existing method in the State of distributing the cost of public education between municipalities and the commonwealth and to devise a plan for the more equitable distribution of the school fund to towns having an assessed valuation of less than $2,500,000 and to submit recommendations relative to taxation for the support of common schools.[31] The board of education was likewise directed to prepare and report to the general court of 1915 a bill embodying a plan for the establishment of a state university to provide free books and instruction to regularly enrolled personal attendants, correspondence work for absentee students and plans for the support of resident students.[32] The board of elevator regulations, previously created, was given additional time to perfect and submit its report.[33] The metropolitan water and sewerage board and the state board of health, acting jointly, were authorized to investigate the expediency and estimate the cost of extending certain sewerage districts and purchasing certain trunk line sewers already constructed.[34] The time for the reports of the commission to investigate the taxation of wild and forest lands,[35] the commission to investigate the subject of drunkenness,[36] the commission on immigration,[37] the commission on the white slave traffic,[38] the commission to devise a just and comprehensive system of state, county and municipal pensions,[39] the commission on street railway service furnished in the metropolitan district,[40] the board of elevator regulations,[41] the state board of health on the disposition of sewage in the south metropolitan sewerage district[42] and the commission on the regulations in force relative to the construction, alteration and maintenance of buildings[43] was extended. The metropoli-

[28] Laws, 1914, 1044.
[29] Laws, 1914, 1001.
[30] Laws, 1914, 1023.
[31] Laws, 1914, 1045.
[32] Laws, 1914, 1032.
[33] Laws, 1914, 991.
[34] Laws, 1914, 1036.
[35] Laws, 1914, 989.
[36] Laws, 1914, 989.
[37] Laws, 1914, 989.
[38] Laws, 1914, 990.
[39] Laws, 1914, 990.
[40] Laws, 1914, 991, 1000.
[41] Laws, 1914, 991.
[42] Laws, 1914, 991.
[43] Laws, 1914, 993.

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tan park commission was authorized to investigate the question of constructing certain boulevards in the State,[44] and the cost of acquiring certain lands for park purposes[45] and of improving certain property of the State.[46] The state board of health and the municipal council of the city of Lynn, acting jointly, were authorized to report a plan for the disposal of sewage in the city of Lynn.[47] A commission was created, consisting of the chairman of the gas and electric light commission, the chairman of the public service commission, the tax commissioner and the attorney-general to consider the question of the taxation of signs and other devices used for commercial advertising and report the draft of a bill.[48] The board of harbor and land commissioners was authorized to investigate the question of conserving, utilizing and equalizing the flow of waters in the streams of the State,[49] and to estimate the cost of improving certain harbors and rivers of the State.[50]

A commission consisting of the tax commissioner, the attorney-general and the chairman of the homestead commission was directed to prepare and report bills embodying uniform methods of procedure in taking land for public purposes,[51] and this commission was continued in 1915.[52] The governor, with the advice and consent of the senate, was authorized to appoint a special commission, one member of which must be a judge of the land court, to consider and recommend changes in the laws relating to liens for labor performed and materials furnished upon real estate and to mortgages to secure loans for the construction of buildings and other mortgages for the purpose of establishing the relative priority of loans and mortgages.[53] The governor, with the advice and consent of the senate, was authorized to appoint a commission of five citizens to investigate the needs, possibilities and probable benefits to the State, and especially the five western counties, of the development and extension of transportation facilities and the utilization of the agricultural, dairy and stock raising opportunities of those counties and to study the causes and remedies of the diminution of the population and the decline of industries and agriculture.[54] The governor, with the advice and consent of the senate, was authorized to appoint a commission, one of whom is the insurance commissioner, to

[44] Laws, 1914, 994.
[45] Laws, 1914, 995.
[46] Laws, 1914, 1001.
[47] Laws, 1914, 1007.
[48] Laws, 1914, 1028.
[49] Laws, 1914, 1029.
[50] Laws, 1914, 1035.
[51] Laws, 1914, 1031.
[52] Laws, 1915, 333.
[53] Laws, 1915, 1038.
[54] Laws, 1914, 1047.

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investigate the practices of insurance companies and their rates in workmen's and other insurance and determine whether a monopoly exists in the insurance business.[55] The state highway commission, the county commissioners of Barnstable county and the county commissioners of Plymouth county, acting jointly, were required to investigate the practicability and cost of constructing a designated highway bridge.[56] The public service commission was authorized to investigate and report on the relation of the railroads to the statute laws of the State.[57] It also was directed to report the amount of capital invested in street railways, the cost of acquiring such lines by eminent domain or otherwise and in the event they should be acquired what part of the cost should be assessed upon the real estate to be benefited,[58] and it was authorized to study existing laws relative to the repair and maintenance of bridges;[59] and to investigate the operation of certain elevated and surface cars and the issuance of free transfer tickets.[60] The state forest commission was authorized to investigate the advisablity of establishing certain state park and forest reservations.[61] The metropolitan park commission and the highway commission were empowered to conduct investigations relative to state highways and parkways.[62]

The economy and efficiency commission was authorized to investigate and report on the readjustment of the finances of the commonwealth by the retirement of the sinking fund bonds and the issuance of serial bonds.[63] The commission on economy and efficiency was empowered to investigate the standardization of grades and compensation in the civil engineering service of the commonwealth.[64] A committee of two senators and four representatives was appointed to investigate the necessary changes in the tax laws.[65] A terminal commission was appointed to investigate the question of terminal facilities and consider the improvement of facilities for transportation of freight in the metropolitan district.[66]

Mississippi. Mississippi created a committee of two senators and three representatives to investigate all state officers and institutions except the penitentiaries.[67]

[55] Laws, 1914, 1053.
[56] Laws, 1914, 1026.
[57] Laws, 1914, 1052.
[58] Laws, 1914, 1031.
[59] Laws, 1915, 305.
[60] Laws, 1915, 320.
[61] Laws, 1915, 307, 328, 338.
[62] Laws, 1915, 321, 329, 330.
[63] Laws, 1914, 1052.
[64] Laws, 1915, 345.
[65] Laws, 1915, 346.
[66] Laws, 1915, 351.
[67] Laws, 1914, 567.

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Montana. Montana provided for a committee of two Republican and two Democratic representatives and two Republican and two Democratic senators to investigate the various initiative measures already adopted and enacted into law and prepare bills for their proper amendment.[68]

Nebraska. The governor of Nebraska is authorized to appoint a commission of three persons to act with a like commission of Iowa to determine certain disputed boundary questions.[69]

Nevada. Nevada provided for the creation of a commission to investigate the question of having school books for the primary and grammar grades printed and produced by the state printing office.[70] The governor is authorized to appoint an educational survey commission of ten persons, including the state board of education to ascertain the efficiency of the educational agencies of the State.[71]

New Hampshire. The tax commissioners of New Hampshire are authorized to make a special investigation of the indebtedness of the towns, cities and counties of the State, including loans made in anticipation of taxes, the amount and character of the indebtedness incurred within and without the debt limit, the amount of the debt outstanding against which no sinking funds are being accumulated, the disposition made by cities and towns of the funds left them in trust and the kind and character of the records kept.[72] The governor is authorized to enter into an agreement with the United States geological survey for the purpose of determining the amount of water power available in the streams of the State and the best means of utilizing the same.[73]

New Jersey. In New Jersey the joint appropriation committee of the legislature was empowered to investigate the financial needs of the department of education, public roads, the institutions under control of the department of charities and corrections and the other departments and commissions.[74] The commission on the care of mental defectives was reëstablished and authorized to continue its investigations of the proper administration of the charities and corrections of the State and the care of dependents, defectives and delinquents.[75] A committee consisting of the medical directors and the wardens of the two state hospitals for the insane, the county physician of Hudson county or his assistant, the county counsel of Essex county or his

[68] Laws, 1915, 469.
[69] Laws, 1915, 654.
[70] Laws, 1915, 522.
[71] Laws, 1915, 371.
[72] Laws, 1915, 266.
[73] Laws, 1915, 91.
[74] Laws, 1914, 639.
[75] Laws, 1915, 881.

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assistant, the warden and medical superintendent of the Essex county hospital and the medical directors of the county hospitals of Atlantic and Camden counties and one assistant from the office of the attorney-general, was provided for to draft laws for the better management and care of insane hospitals and the commitment thereto and the care therein of insane persons.[76]

New Mexico. In New Mexico a committee consisting of three representatives and two senators was appointed to investigate the management and financial status of the college of agriculture and mechanic arts.[77]

New York. By appropriations New York provided for investigations by existing boards and commissions of the conditions of grape growing, including cultivation, methods of management and insect pests;[78] hop production and diseases;[79] field, orchard and truck garden crops and the means of producing sanitary milk;[80] bovine tuberculosis;[81] grape culture and insect pests;[82] soils and plant nutrition;[83] and hydrographic investigations.[84] The commission created in 1911 to investigate manufacturing conditions in cities of the first and second classes was continued and authorized to proceed with its work.[85] A commission of five members was authorized to investigate the subject of the care, custody, treatment and training of the mentally deficient including epileptics.[86]

North Carolina. The governor of North Carolina is authorized to appoint a commission of five citizens, one a member of the supreme court, one a superior court judge, two active practitioners and one layman to revise and simplify the present system of legal procedure and to formulate a uniform system of inferior courts.[87]

North Dakota. In North Dakota a joint legislative committee was appointed to investigate the financial affairs of the board of control[88] and a similar committee to inspect the affairs of the examiner's department.[89]

Ohio. In Ohio, a legislative committee, with the assistance of the attorney-general, is authorized to investigate the bank department and

[76] Laws, 1915, 882.
[77] Laws, 1915, 20.
[78] Laws, 1915, 2465.
[79] Laws, 1915, 2652.
[80] Laws, 1915, 2465, 2220.
[81] Laws, 1915, 2327.
[82] Laws, 1915, 2220.
[83] Laws, 1915, 2219.
[84] Laws, 1915, 2269.
[85] Laws, 1914, 373.
[86] Laws, 1915, 772.
[87] Laws, 1915, 480.
[88] Laws, 1915, 102.
[89] Laws, 1915, 97.

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recommend the enactment of such measures as will insure better protection to creditors and owners of banks which are closed by the department.[90] Two other legislative committees were created, one to investigate the several departments of the State and ascertain what positions can be abolished and what salaries reduced without impairing the efficiency of the public service,[91] and the other to investigate the proper housing of state offices, bureaus and departments.[92] The governor is authorized to appoint a commission consisting of the adjutant-general, the superintendent of public instruction and the commandant of the military department of the state university to investigate and report a policy and plan for the organized instruction of the students in the schools and colleges of the State in the use of modern arms and the rudiments of drill and maneuvers and the maintenance and sanitation of camps;[93] and a second commission on rural credits and coöperation to investigate the existing laws of Ohio on those subjects and submit recommendations.[94]

Oregon. In Oregon a legislative committee was provided for to prepare bills for the abolition and consolidation of state boards, commissions and officers in the interest of efficiency and economy;[95] a second committee to investigate the production of flax and flax fiber and the feasibility of installing flax manufacturing machinery at the state penitentiary;[96] a third committee, to act with a similar committee from Washington, to confer on the subject of legislation affecting the fishing industry of the Columbia river;[97] and a fourth committee to investigate the actual financial needs and requirements of higher education in the State.[98] Two special commissions were created: one to examine the laws of Oregon relative to timber and forestry and recommend such changes as will foster the timber industry;[99] and a second which, with the assistance of the superintendent of banks, is required to investigate the trust company business and its regulations.[100]

Pennsylvania. In Pennsylvania, three citizens of Philadelphia, to be selected by the governor, are required to consider the feasibility of establishing an administrative building in the city of Philadelphia to house certain branches of the state government.[101] The governor is

[90] Laws, 1915, 847.
[91] Laws, 1915, 852.
[92] Laws, 1915, 861.
[93] Laws, 1915, 861.
[94] Laws, 1915, 870.
[95] Laws, 1915, 605.
[96] Laws, 1915, 607.
[97] Laws, 1915, 621.
[98] Laws, 1915, 623.
[99] Laws, 1915, 613.
[100] Laws, 1915, 615.
[101] Laws, 1915, 1098.

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authorized to appoint a commission to investigate the practicability of establishing a plant at the new state penitentiary for the manufacture of brick to be used on state highways.[102] A committee consisting of the chairmen of the appropriation committees of the house and senate and five additional members from each appropriation committee was authorized to investigate the charges which had been preferred against the administration of all state-aided institutions.[103]

Porto Rico. Porto Rico continued the economy commission created in 1914 and provided that no new office shall be created or changes made in the compensation of public officials without its approval.[104] A commission was created to investigate the question of publishing the works of Eugenio Maria de Hostos.[105]

Rhode Island. In Rhode Island, the members of the state house commission, the president of the metropolitan park commission, the mayor and president of the common council of the city of Providence and the chairman of the city planning commission were created a special commission to investigate the question of the treatment of the large, open and barren areas of land in the city of Providence.[106]

South Dakota. In South Dakota the state engineer was instructed to investigate the subject of the use and control of all publicly and privately owned artesian wells, showing the owner, date of construction, size, flowage, purpose for which used, etc.[107]

Tennessee. Tennessee provided for the appointment of legislative committees to investigate the results achieved by the operation of fire marshal departments, out of which grew the passage of a law;[108] fire insurance rates;[109] the practicability of purchasing a governor's home;[110] and the department of workshops and factory inspection.[111] A similar legislative committee is authorized to employ competent scientists to ascertain whether tuberculosis germs exist in the state penitentiary.[112] A committee, consisting of the chairmen of the ways and means committee of the house and the finance committee of the senate, is authorized to appoint a sub-committee of five persons to investigate the financial conditions of the various departments of state.[113] The governor is empowered to appoint a commission to investigate and report

[102] Laws, 1915, 1099.
[103] Laws, 1915, 1061.
[104] Laws, 1915, 102.
[105] Laws, 1915, 112.
[106] Laws, 1916, 132.
[107] Laws, 1915, 62.
[108] Laws, 1915, 561, 613.
[109] Laws, 1915, 628.
[110] Laws, 1915, 639.
[111] Laws, 1915, 641.
[112] Laws, 1915, 635.
[113] Laws, 1915, 637.

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on the practicability of establishing a free textbook system under the direction of the department of education.[114] A committee of three, one a representative of capital, one a representative of labor and one a representative of the public, was created to investigate the effect of convict made goods when brought into competition with goods produced by free labor.[115] The governor, the comptroller, the treasurer, the secretary of state and the chairman of the state board of control were authorized to investigate the advisability of the State's purchasing or installing a printing plant to do the printing and binding for the State.[116] The joint legislative educational committee, which was formerly appointed, was authorized to continue its investigation of educational matters.[117]

Texas. Texas created a commission consisting of three senators, three representatives, the state health officer and the state dairy and food commissioner to investigate and recommend certain sanitary changes.[118]

Vermont. In Vermont the senate and house committees on the insane were authorized to visit the insane hospital and investigate its management.[119] The senate and house prison committees were authorized to visit the state prison and conduct investigations, and submit reports.[120] A joint special committee of three senators and three representatives was appointed to consider the question of exemptions from taxation and the abolition of deductions from debts owing.[121] A commission was created to consider and report more expeditious methods of administering justice.[122]

Virginia. Virginia authorized the appointment of a joint committee of four representatives, three senators and three other persons appointed by the governor to consider the whole question of taxation. The state board of charities and corrections was authorized to continue its investigations of the feeble-minded, segregation and the prevention of procreation, and report to the next general assembly.[123]

Wisconsin. Wisconsin provided for the appointment of a committee of two senators and three representatives to investigate the question of the purchases, sales, options and contracts for university lands.

[114] Laws, 1915, 607.
[115] Laws, 1915, 610.
[116] Laws, 1915, 645.
[117] Laws, 1915, 655, 659.
[118] Laws, 1915, 274.
[119] Laws, 1915, 534.
[120] Laws, 1915, 534.
[121] Laws, 1915, 535.
[122] Laws, 1915, 537.
[123] Laws, 1914, 377, 242.

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The conservation commission was directed to investigate the whole question of fish, game and wild life.[124]

Wyoming. Wyoming provided for the appointment of a legislative committee to investigate the water rights enjoyed by certain settlers.[125]

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New Administrative Agencies. The number of administrative agencies of state government created by legislation seems to have reached its high tide in 1913, for the legislation of 1915 shows but about one hundred and seventy new agencies created as against two hundred and thirty-six in 1913. The number discontinued falls from seventy-nine in 1913 to sixty-eight in 1915. In eighteen cases there occurred what might fairly be called reorganizations in 1915 as against twelve in 1913.

As was remarked in the notes on this subject for 1913,[1] the problem of what properly should be included in such an enumeration is perplexing. Inaccuracies of classification as well as sins both of omission and commission are almost certain to be made but general tendencies, at least, can be shown. An attempt has been made to apply again the rules of inclusion and exclusion set up on that occasion. Under the general head of agencies created are included besides those created outright as separate organizations, eleven cases where the exercise of a new function assumed by the State has been entrusted to an existing office, as in Michigan where the insurance commissioner is made ex officio fire marshal, and ten instances where functions formerly exercised by independent authority were combined with other existing agencies.

In some twenty-five instances new bureaus in existing departments are entrusted with new branches of administration. This practice is especially to be observed in Pennsylvania where there have been created bureaus of municipal statistics, employment and workmen's compensation in the department of labor and industry, forest protection in that of forestry, vital statistics in that of health, vocational education in that of public instruction, distribution of documents in that of public printing and public records in the state library.

The new offices are well distributed geographically through the

[124] Laws, 1915, 983, 1007.
[125] Laws, 1915, 263.
[1] See REVIEW, vol. 8, p. 431, August, 1914.

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middle west, west and south, but are most numerous in California with fifteen; Pennsylvania with fifteen; Alabama with ten, and North Dakota and Tennessee with eight each. Five States holding legislative sessions seem not to have added to their administrative machinery during the year. They are Georgia, Idaho, Massachusetts, Nevada, and South Dakota.

Of one hundred and fifty which are new and independent authorities, about forty are filled ex officio. A dozen more are partly ex officio and partly appointive.

The remaining hundred are filled by appointment, save the one case of dairy and food commissioner in Oregon who is elected by the people. Of the ex officio and mixed authorities most are boards, consisting of higher state officers occasionally with provision for professional representation thereon, as in the case of the highway commission of Tennessee made up of the governor, state geologist, dean of engineering of the state university and three appointed by the governor. In some cases the technical knowledge is supplied by a permanent secretary. Boards of examination and registration in professions are made up of professional practitioners in nearly all cases.

In the presence of the numerous reports of efficiency and economy commissions made recently, the trend in matters of organization is the more interesting. While there are some notable instances where a logical reorganization and centralization has been accomplished, in other cases, even in the same States, have new authorities been created to care for activities which might well have been given over to existing departments. Precedent, prejudice and politics have been the motive forces rather than efficiency and economy. Here and there, however, substantial results have been attained. As has been noted elsewhere a large majority of the discontinuance of officers are due to consolidations and a substantial number of new creations are but bureaus in larger departments. One notable instance is in Wisconsin where the agencies of forestry, fish, game, parks and fire protection are united under a conservation commission, and where six agencies including the old board of agriculture, and those relating to veterinary medicine, orchard and nursery inspection and immigration were merged in a department of agriculture headed by a single commissioner. In North Dakota, no less than eight boards of trustees of educational institutions have been merged in a board of regents. A reorganized department of agriculture in Pennsylvania absorbed the work of four analogous offices. New Jersey consolidated four offices into a department of

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commerce and navigation, four into a department of shell fisheries, and two into a board of taxes and assessments. Tennessee and Colorado substituted central boards of control for separate boards of trustees for charitable and correctional institutions.

While not of great importance, it is significant to observe a tendency to employ the words "department" and "bureau" in the sense employed in the national administration, as well as a tendency to clearer thinking in distinguishing the department or bureau from the officer at its head, as the "department of fire protection" instead of the "fire marshal's department" and likewise the "department of agriculture" rather than the "board of agriculture" when referring to the office and not to the incumbents.

In the group of changes which may perhaps be best treated as reorganizations there is a marked tendency away from the board to the single head for a department. This is observed in the departments of labor in Connecticut, of irrigation and of grain inspection in Kansas, of fish and game in Minnesota, of conservation in New York and Wisconsin, of health in West Virginia and in Utah and of agriculture in Ohio. In New York, on the other hand, and in Indiana, the bureau of inspection has been succeeded by an industrial board.

In Wisconsin the examination and licensing of doctors, surgeons, nurses, midwives, osteopaths and practitioners of "all other forms of medicine or healing" have been gathered under the board of medical examination. In Alabama the railroad commission is given power over other public utilities and becomes the public service commission. In Arizona an appointive land board gives way to an ex officio board with a land commissioner as executive officer. Tennessee places beside its superintendent of education a board of education. The reorganization of the labor department in New York substitutes for the commissioner of labor an industrial board which takes over the work of the workmen's compensation board.

A limitation of the tendency of state activities to expand seems to be evidenced in the discontinuance of no less than sixty-eight offices during the year. This limitation is, however, more apparent than real, since of these only twelve indicate a real discontinuance of the function, the others resulting only in a transference of the duties to some new authority or a consolidation with some existing institution. Tax commissions were abolished outright, as was the department for the supervision of officers and accounts in Oregon. Oregon also abolished the office of immigration agent, the board for the licensing of anes-

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thetists, the state biologist and the Portage railway commission. The board of dentistry in Florida, the economy and efficiency department and the office of fire marshal in New York, and the bureau of cotton statistics in Alabama shared the same fate.

The steps taken toward centralization through consolidation in Wisconsin, North Dakota, Pennsylvania, New Jersey, Colorado and Tennessee and the reorganization of the labor department in New York account for most of the departments extinguished by transfer. The merging of the work of the land agent with that of the auditor, of the immigration commissioner with that of the commissioner of agriculture, and of the oyster commission with that of the secretary of state in Alabama; and the consolidation of the building and loan department with that of the auditor in Connecticut are examples of the remaining consolidations. In New Hampshire the work of the state engineer is transferred to the highway engineer while in Oregon the reverse is true.

A general survey of the field shows that not only is the number of new administrative creations less than in 1913 but that of those created fewer are of first rate importance. The creation of public service commissions, departments of labor, and boards of charities and corrections has given place to boards of professional examination and the creation of minor authorities covering a very wide range. In the direction of reorganization and consolidation, though the larger plans of the efficiency and economy commissions have in no case been adopted, yet their influence has been felt to some good purpose.

An analysis of the legislative creations of administrative character grouped by function shows these results:

If we group under the head of protective functions those pertaining to safety, health, morals and labor, labor leads with industrial commissions in New York and Colorado, industrial accident or workmen's compensation boards in Maine, Montana, West Virginia and Wyoming; New York also has an advisory industrial council and Pennsylvania an insurance board to manage the state insurance fund. There are also two child labor authorities (Alabama and Delaware); a commissioner of mediation and conciliation (Michigan); a board of immigration (North Dakota); employment bureaus in two States (Iowa and Pennsylvania); an industrial welfare commission (Kansas); two for mine inspection (Arizona and Tennessee); and one for boiler inspection (Connecticut). Public safety is concerned with three armory boards in New Mexico and a body of state rangers created in Tennessee.

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Fire protection is provided in Michigan and Tennessee. There are also agencies for motor vehicle control in California and Minnesota. Public morals are the concern of a board of censors of moving pictures in Pennsylvania, excise commissioners in New Hampshire, and an athletic commission in Minnesota.

The public health is the object of agencies for dairy and food inspection in North Dakota and Oregon, cannery inspection in Delaware, hotel inspection in Iowa, sanitary engineering in Iowa and tuberculosis control in California and Tennessee. The boards of professional examination in the interests of health include preliminary medical examination in Tennessee, medical examination in New Hampshire, five in "chiropractic" (Arkansas, Nebraska, North Dakota, Oregon, Tennessee); pharmacy, one (Montana); chiropody, three (California, Connecticut, Michigan); nurses, five (Colorado, Maine, Nebraska. North Dakota, Ohio); optometry, three (Illinois, Minnesota, Utah); dentistry, two (Alabama, California); embalming, one (California).

The creations for administering charities and corrections include three boards of control (Colorado, Delaware and Tennessee); one reformatory board (Maine); a pardon board (California); regulation of detectives (California); lunacy commission (Oklahoma); care of the blind (Alabama); to provide work for the blind (Indiana); a Confederate pension board in Alabama and a board of parole in Rhode Island.

Educational authorities are: state board of regents (North Dakota); two commissioners of education (Delaware, North Dakota); trustees of agricultural schools (Vermont); two boards of trustees donated to colleges (Vermont); a bureau of vocational education (Pennsylvania); curators of the state library (Arizona); two historical commissions (California, Indiana); and an illiteracy commission (Alabama).

The care of economic interests gives rise to a wide range of offices. Banking is cared for by a banking board in South Dakota and a bank department in Montana—both cases evolutions from the office of public examiner; a bank examiner in New Mexico and a charter board in Indiana, Florida and Missouri have provided supervision for building and loan associations, and Michigan has a securities board to administer the "blue sky" law. Insurance departments were created in Alabama and Oklahoma. Wyoming alone created a public service commission, though Alabama gives that title to its railroad commission along with wider duties. Highway departments were created in New Hampshire, Oklahoma and Tennessee; and in North Carolina there was created both a commission and a highway commissioner. Wisconsin has provided a chief engineer for the service of all departments.

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The field of agricultural interests is represented by one department of agriculture (Wisconsin); an advisory agricultural commission (Pennsylvania); one bureau to regulate commission men (Alabama); and one state commission market director to operate a state market (California); one state entomologist (Wisconsin); two state fair boards (Michigan, Wisconsin); one irrigation board (California); a board of forestry in Texas; a land bank board in Missouri and a department of farm loans in Montana, a plant board in Florida, and a board of control of experiment stations in Ohio.

Supervision of weights and measures is entrusted to a bureau of standards in Oklahoma and to a superintendent of weights and measures in Utah. Authority under various titles was created for the care of fish and game in Oregon, Tennessee and Washington, and for shell fish especially in New Jersey. North Carolina created the office of forester and Pennsylvania a bureau of forest protection in the department of forestry. Inspection of certain commercial articles was provided through oil inspectors in Colorado and North Dakota, a grain inspection department in Montana and an inspector of naval stores in Florida. The position of state chemist was created in Colorado. Waterborne commerce was recognized in New Jersey by the creation by consolidation of a department of commerce and navigation, and in Alabama by a board of harbor commissioners to act also as a board of pilot commissioners. Bureaus of vital statistics were organized in four states (California, Florida, Oregon and Pennsylvania) and a bureau of municipal statistics in Pennsylvania. Among the examining authorities for professions or employments other than those connected with public health are four boards of veterinarians (Arkansas, Pennsylvania, West Virginia, Wyoming); five boards of accountancy (Arkansas, Indiana, Iowa, South Carolina and Texas); four boards of architecture (Florida, Michigan, New York, North Carolina); horseshoers and structural engineers are to be examined in Illinois.

Finance is made the concern of several new agencies including: a tax commission (South Carolina); board of taxes and assessment (New Jersey); advisory tax board (Virginia); auditing board (Iowa); traveling auditor (New Mexico); fiscal board for investment of funds (Wyoming); board of equalization (Alabama); board of finance, for budget making (Connecticut); budget committee (Vermont); court of claims (New York), and an emergency to make transfers of appropriations (North Dakota).

Last of all must be considered a miscellaneous group of authori-

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ties which may be said to assist in the maintenance of the state government itself. This includes: one civil service commission (Kansas); an inspector of masonry, public buildings and works (Illinois); a state architect and a capital planning commission (California); two state purchasing boards (Alabama, California); three state printing boards (Oregon, Tennessee, Vermont); a state printer (Oregon); a superintendent of printing (Illinois); a legislative reference library (North Carolina); a division of public records (Pennsylvania); a document editor (Iowa); an office for distribution of documents (Pennsylvania); commissioners of uniform legislation (Wyoming); an executive counsel (Wisconsin); and two authorities for the supervision of liquor selling in Ohio.

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Public Health Administration. A wave of constructive public health reform is sweeping over the country and we are coming to recognize that here in the United States an unnecessary sacrifice is being made to preventable disease. The cities quite generally have handled their health problems satisfactorily but the sanitary conditions in the small town and the rural communities have not been what they should be. Public health administrators recognize that the problem today is to reach the small town and the rural community and organize effective public health service.

More than half the people of this country live in the rural districts; 53.7 per cent of the total population being classed as rural according to the 1910 census. In the United States there are 2953 counties, 80 per cent of which are essentially rural in character. Up to this time with small exceptions the rural districts throughout the country have received scarcely any attention from sanitary authorities and as a result sanitary conditions have improved very little.

It has been a sort of tradition that the country or small town is healthier than the congested city but according to recognized authorities, the reverse is rapidly coming to be true. Statistics compiled by the United States census bureau show that from 1900 to 1912 the death rate in registration states decreased 21.2 per cent in the cities but only 8.6 per cent in rural districts. In New York City the death rate for a number of years has been steadily declining, while in the rural districts of the State at the same time it has slowly increased.

In practically every State the county has been the unit for public

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health administration, and up to last year only seventeen of the whole number of counties had arranged for full-time health officers. North Carolina is the only state employing to any extent full-time county health officers, and eleven of the total number of seventeen such officers doing good work toward bettering public health conditions are in that State. The system of administering regulations pertaining to the health of the rural dweller in the past has proved inefficient for these reasons. No one saw the need for an efficient public health service for the rural dweller. Problems of sanitation and health have never been brought home with such force to him as they have been to the resident of a great city where if the water supply is polluted scores and hundreds of persons die in a day. Funds were lacking with which to carry on public health work. And lastly, men were employed as health officers who were untrained for the work and who received such small salaries that they were obliged to keep up some other business as the practice of medicine to the neglect of their duties as a public health officer in order to make a livelihood.

Seven States in the last few years have made an effort to better public health conditions for their rural population by providing for a division of these States into health districts with a trained health officer at a good salary devoting all his time to public health conditions in each district.

A brief review of the outstanding features of these various state laws follows:

Massachusetts was the first to adopt the plan of dividing the State into health districts. In 1907 a law[1] was passed providing for fifteen health districts with a full-time state inspector appointed by the governor with the advice and consent of the senate in each district. Later the number of health districts was reduced to fourteen and still later to twelve. Prior to the creation of the state board of labor and industries in 1912[2] many of the duties of that department were administered by the district inspectors. In 1914 a new law[3] reorganizing the state board of health was passed. A commissioner of health was made the head of the department and with the approval of the public health council was empowered to divide the State into eight health districts and appoint a full-time health officer in each district.

The state department of health in New York State was also reorganized in 1913.[4] The department was separated into nine divisions each

[1] Acts of 1907, Ch. 537.
[2] Acts of 1912, Ch. 726.
[3] Acts of 1914, Ch. 792.
[4] Acts of 1913, Ch. 559.

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managed by a director appointed by the state commissioner of health. There was also provided a public health council possessing broad legislative powers which consisted of the commissioner of health and six other members all appointed by the governor. The commissioner of health was empowered to divide the State excluding New York City into twenty or more districts and appoint a sanitary supervisor in each district. Last year owing to a lack of funds the number of sanitary supervisors was reduced to ten.

The 1913 legislature passed a law[5] for the State of Wisconsin authorizing the state board of health to divide the State into five districts and appoint a full-time deputy state health officer in each. The Wisconsin deputy is under civil service regulation and his term of office is during efficiency and good behavior.

The state board of health of Maryland was given power[6] by the legislature in 1914 to divide the State outside the city of Baltimore into ten districts following county boundary lines and appoint a full-time deputy state health officer in each. The duties of the deputy as defined by law follow very closely the duties prescribed by law for the Wisconsin deputy.

The Illinois economy and efficiency commission after a study of Illinois health agencies in 1914 recommended in their report that the State be divided into at least eight health districts each with its own full-time state health officer. The 1915 Illinois legislature provided indirectly through an appropriation bill[7] for a division of the State into four health districts with a full-time medical health officer in each district. A division into five districts was made with the state epidemiologist acting for the time as district health officer in one of the smaller districts in addition to his regular duties until a more liberal appropriation is made for the work.

For health supervision the State of Florida is divided into seven districts,[8] each under the supervision of a full-time appointee known as the assistant to the state health officer. In addition two "county agents" and four sanitary policemen look after health problems in the cities of the State, for few Florida cities have health departments of their own. Practically all public health work in Florida is done by the

[5] Acts of 1913, Ch. 674.
[6] Acts of 1914, Ch. 675.
[7] General appropriation bill.
[8] Regulation of state board of health which has full authority in all matters pertaining to public health.

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State. This is the only State which finances its health work by a special tax, levying a tax of one-half of one mill on all assessable property in the State for the maintenance and support of the state board of health.

Pennsylvania is the only other State that centralizes state health work after the plan which Florida employs. Since the department of health was reorganized in 1905[9] Pennsylvania has the most highly centralized system of health administration of any State. The commissioner of health has power to apportion the State into ten districts for the administration of sanitary affairs and to appoint a health officer in each district. All local health work in unincorporated districts as well as in many incorporated places is under direction and supervision of the central state authority. According to Dr. Chapin there are in the State 670 districts having a population of over 2,500,000 in which the health officer is appointed, directed and paid by the State. The State also appoints and pays the 68 county medical inspectors who serve as supervisors under the direction of the medical division of the state department.

A number of other States have given considerable study and attention to the problems of improving health conditions particularly in their rural sections through the services of full-time health officers, either by dividing the State into health districts or by making use of the county unit in which to provide for full-time health officers. Legislatures in Kansas, Michigan, Ohio and Vermont at their last sessions considered dividing the State into health districts, while Indiana and Kentucky at the same time proposed to put a full-time health officer in every county. No State acted favorably on any of these proposals. Other States including Alabama, Georgia, Louisiana and Minnesota have given more or less attention to this problem.

An enumeration of the duties of the full-time health officer is found in practically every state law providing for such officers. In general they are similar in all States. Following are the duties that a sanitary supervisor in New York State must perform according to the law of that State:[10]

1. "Keep himself informed as to the work of each local health officer within his sanitary district.

2. Aid each local health officer within his sanitary district in the performance of his duties, and particularly on the appearance of any contagious disease.

[9] Acts of 1905, Ch. 219.

[10] Acts of 1913, Ch. 559.

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3. Assist each local health officer within his sanitary district in making an annual sanitary survey of the territory within his jurisdiction, and in maintaining therein a continuous sanitary supervision.

4. Call together the local health officers within his district or any portion of it from time to time for conferences.

5. Adjust questions of jurisdiction arising between local health officers within his district.

6. Study the causes of excessive mortality from any disease in any portion of his district.

7. Promote efficient registration of births and deaths.

8. Inspect from time to time all labor camps within his district and enforce the regulations of the public health council in relation thereto.

9. Inspect from time to time all Indian reservations and enforce all provisions of the sanitary code relating thereto.

10. Endeavor to enlist the coöperation of all the organizations of physicians within his district in the improvement of the public health therein.

11. Promote the information of the general public in all matters pertaining to the public health.

12. Act as the representative of the state commissioner of health, and under his direction, in securing the enforcement within his district of the provisions of the public health law and the sanitary code."

Authorities agree that the following conditions should prevail in public health administration:

1. That the district health officer be directly responsible to the state department of health and receive and enforce orders or regulations issued from that source.

2. That the public health officer must be a man trained in the science of sanitation and public health, the average physician not being qualified to undertake such work.

3. That the man wanted for the position of public health officer should be a trained man who is interested in public welfare; who will be a live executive; and who can use perspective in the direction of public health activities.

4. That such an officer should be a full-time official, giving all his time to the work of serving the public and not employed in any other business, and that an adequate salary should be paid to him so that it will not be necessary to engage in any other occupation.

ARTHUR CONNORS.

Indiana Bureau of Legislative Information.

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Codification. During the legislative years 1914 and 1915, several States authorized the revision, compilation, consolidation and codification of the whole or a part of the existing statute laws.

General Codifications. Delaware completed a revised code in 1914 and the general assembly of 1915 supplied certain omissions, corrected certain clerical errors, and formally adopted the code.[1] Georgia appointed a committee of three senators and five representatives to examine the so-called Park Code and report its opinion to the next general assembly on the adoption of this code as the official code of the State.[2] Maryland formally legalized the general code of the State as revised and edited by George P. Bagby, appearing in three volumes.[3] Maine provided for the appointment of a commission to supervise the revision of the general laws of the commonwealth.[4]

Partial codifications. The partial codifications authorized were rather numerous. One of the most comprehensive partial codifications completed in 1915 was the Michigan judiciary act which was enacted by the general assembly and consolidates all existing laws relative to the courts and legal procedure.[5] At the same session the Michigan legislature authorized the attorney-general to prepare bills for the revision, consolidation and classification of the insurance laws;[6] the secretary of state and the game, fish and forestry warden are authorized to revise, consolidate, compile and index all fish and game laws and report the work to the succeeding general assembly, and this work is to be done after the adjournment of each legislature;[7] the secretary of the senate and the clerk of the house are required to revise and compile the election and registration laws and report to the next general assembly;[8] and the secretary of state is required to compile the laws relative to township officers.[9] The legislative reference bureau of Pennsylvania is authorized to continue the codification of certain laws which was formerly authorized and was begun in 1913.[10] The legislature of Tennessee authorized the governor to appoint a committee to codify the school laws and report to the next general assembly.[11] Utah created an educational code commission consisting of the superintendent of public instruction, the attorney-general and three other citizens.[12] Wis-

[1] Laws, 1915, 96 and 99.
[2] Laws, 1915, 998.
[3] Laws, 1914, 18.
[4] Laws, 1915, 845.
[5] Laws, 1915, second part, 3 ff.
[6] Laws, 1915, 242.
[7] Laws, 1915, 404.
[8] Laws, 1915, 549.
[9] Laws, 1915, 226.
[10] Laws, 1915, 474.
[11] Laws, 1915, 665.
[12] Laws, 1915, 25.

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consin directed the conservation commission to investigate all matters relating to fish, game and wild life, and recommend a revision and codification of the laws relating to those subjects.[13] In Idaho the governor was authorized to appoint a commission of five persons to revise and codify the irrigation and drainage laws of the State and draft and prepare the necessary bills and recommendations.[14] Massachusetts directed the board of education to compile the statutes relating to public education and to report and recommend amendments.[15] The time allowed to the state board of health to codify the health laws was extended.[16] The secretary of state is authorized to compile the general laws relating to towns;[17] the commissioner of weights and measures to codify the laws relating to weights and measures;[18] and the special commission created to investigate the laws governing liens and mortgages is authorized to codify the laws on those subjects.[19]

In Indiana two codifications were authorized. A commission consisting of the secretary of the state board of health, the secretary of the state board of pharmacy, the secretary of the state board of registration and examination and the director of the bureau of legislative information and one additional member to be appointed by the governor is authorized to prepare a revision and codification of the statutes concerning health and medicine, including the laws regulating the subjects of the manufacture, handling and sale of drugs, medicine, narcotics and poisons, the sale of intoxicating liquors for medical purposes, and the practice of medicine, dentistry, nursing, pharmacy and veterinary science.[20] A second commission, consisting of two mine operators and two miners, appointed by the governor, the director of the bureau of legislative information and a mining engineer appointed by the director of the United States bureau of mines, was created to codify all of the mining laws of the State and report to the general assembly of 1917.[21]

CHARLES KETTLEBOROUGH.

Indiana Bureau of Legislative Information.

Reforms in legal systems. In response to the increasing demand for speedier and more accurate justice the legislatures of a considerable

[13] Laws, 1915, 1007.
[14] Laws, 1915, 251.
[15] Laws, 1914, 1002.
[16] Laws, 1914, 990.
[17] Laws, 1914, 1026.
[18] Laws, 1914, 1029.
[19] Laws, 1914, 1038.
[20] Laws, 1915, 32.
[21] Laws, 1915, 597.

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number of States are endeavoring to accomplish something in this direction. The attempts of 1914 and 1915 fall with some degree of accuracy into a fourfold classification as follows: The reorganization of courts, establishment of municipal courts, reforms in trial by jury and simplification of procedure.

Reorganization of courts. Alabama now provides a circuit court in every county and follows the lead of other States in consolidating the chancery court, and all other courts of record with the exception of the probate court, into the circuit court.[1] Alabama has also abolished the justice of peace courts in cities having a population of 35,000 or more and confers their jurisdiction upon the courts of common pleas.[2]

A constitutional amendment was attempted in California to lengthen the term of superior judges to twelve years and subject them to recall, but California citizens appeared unready for this reform and the measure was defeated.

The city court of Savannah, Georgia is divided into departments.[3]

The city courts of Illinois are given concurrent jurisdiction with circuit courts in civil cases both in law and chancery and in all criminal cases arising in the city.[4]

The general assembly of Maryland, by constitutional amendment, has been given the power to enact laws for the suspension of sentence by the court, for any form of indeterminate sentence in criminal cases and for the release of convicts upon parole.

Michigan has passed an extensive judicature act comprising 482 pages, providing for a revision and consolidation of the statutes relating to the organization and jurisdiction of the courts, their powers and duties and judges and officers; the forms of civil actions, pleadings, evidence, practice and procedure.[5] The justices of the supreme court are given the power to establish and modify practice in their court and all other courts of record in cases not provided for by statute, with a view to the attainment of certain enumerated improvements in practice.

Missouri has created a third division of the sixth judicial circuit of the State and has empowered the judges en banc to distribute and transfer cases.[6] In the circuit court of St. Louis the business is to be classified, arranged, distributed and assigned among the judges in such manner as a majority of them shall decide.[7]

[1] Laws, 1915, 279.
[2] Laws, 1915, 825.
[3] Laws, 1915, 122.
[4] Laws, 1915, 350.
[5] Laws, 1915, 569.
[6] Laws, 1915, 257.
[7] Laws, 1915, 263.

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Montana provides that each judicial district having more than one judge may divide the court into departments, prescribe the order of business and make rules for the government of the court.[8]

A commission to aid the supreme court is Nebraska's idea in solving the problem of higher court congestion.[9]

A constitutional amendment is proposed by the Oklahoma legislature for the consolidation of the supreme court and the criminal court of appeals and making the latter a division of the former.[10] Before waiting for relief from this quarter, however, the governor has been authorized, with the approval of the supreme court, to appoint nine commissioners as a supreme court commission to assist the supreme court.[11]

Oregon makes a departure in the creation of a small claims department of each of the district courts for the handling of cases arising out of money claims not exceeding twenty dollars. These courts are to have a simplified procedure and informal pleadings. No attorney will be permitted except by the special consent of the judge.[12]

Juvenile courts have just been created in Rhode Island by providing that the district courts shall, at times, sit as juvenile courts.[13]

All cities in Virginia of 50,000 or more inhabitants are to elect a special justice of the peace to be known as justice of the juvenile and domestic relations court. The court is given exclusive jurisdiction of juvenile and domestic relations cases.[14]

Municipal courts. A considerable number of States have provided that their large cities, and in some cases also smaller cities, shall follow the noteworthy lead of Chicago in establishing municipal courts. Aside from the few differences that might be expected these new courts are formed along the plan of the Chicago court. In general the chief provisions are: the nomination and election of judges on a non-partisan ballot, the abolition of justice of peace courts, a departmental division of the court and a classification and distribution of the litigation among the several departments, a jury trial only upon written demand. Such courts were established in Arkansas (cities of the first class),[15] Georgia (Boston,[16] Sylvester,[17] Columbus,[18] Darien,[19] Leesburg,[20] Savannah,[21]

[8] Laws, 1915, 11.
[9] Laws, 1915, 377.
[10] Laws, 1915, 569.
[11] Laws, 1915, 113.
[12] Laws, 1915, 517.
[13] Laws, 1915, 12.
[14] Laws, 1914, 82.
[15] Laws, 1915, 340.
[16] Laws, 1914, 194.
[17] Laws, 1914, 215.
[18] Laws, 1915, 63.
[19] Laws, 1915, 79.
[20] Laws, 1915, 101.
[21] Laws, 1915, 124.

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Baxley—amended,[22] Blackshear—amended[23,24]); Iowa (20,000 or more inhabitants);[25] Kansas (16,000 or more);[26] Minnesota (1,000 or more);[27] Nebraska (25,000 or more);[28] New Hampshire (2000 or more);[29] Ohio (Columbus).[30] Municipal court acts amended along the liberal plan outlined above are: New York (New York City),[31] Ohio (Cleveland,[32] and Cincinnati).[33]

Reforms in trial by jury. Some States are making in all trial courts the same changes in the jury system that have been noted in municipal courts. Alabama has so provided.[34] All civil cases are to be tried without jury unless the plaintiff at the time of filing his complaint endorses a demand thereon for a jury trial or unless the defendant makes such a demand at the time of filing his initial pleading. Some confusion has arisen in the enactment of this legislation, for another act of the same session treats the same matter and with the difference that the defendant is given thirty days to make his demand for a jury trial.[35]

Massachusetts provides that a party bringing an action in the municipal court of Boston which might have been begun in the superior court is deemed to have waived his right of trial by jury and also his right of appeal to the superior court.[36]

In all the county courts of Pennsylvania a jury trial is now to be had only upon request.[37]

South Dakota provides that in all civil actions tried in the circuit, county or municipal courts where a jury of twelve is required, the verdict may be rendered by five-sixths.[38]

Wyoming has modified the jury system as follows:[39] In all cases arising out of contracts a jury trial if desired must be demanded. The time for making the demand differs from other States. It must be made by the defendant when he files his answer to the plaintiff's complaint, or by the plaintiff when he files his reply to the defendant's answer or, if the plaintiff files no reply, the demand must be made at the time the reply would be due. The party making the demand is required to deposit twelve dollars. An extra twelve dollars is then to

[22] Laws, 1914, 184.
[23] Laws, 1914, 188.
[24] Laws, 1914, 189.
[25] Laws, 1915, 46.
[26] Laws, 1915, 231.
[27] Laws, 1915, 106.
[28] Laws, 1915, 371.
[29] Laws, 1915, 32.
[30] Laws, 1914–15, 365.
[31] Laws, 1915, 836.
[32] Laws, 1914–15, 274.
[33] Laws, 1914–15, 481.
[34] Laws, 1915, 824.
[35] Laws, 1915, 939.
[36] Laws, 1914, 368.
[37] Laws, 1915, 48.
[38] Laws, 1915, 467.
[39] Laws, 1915, 58.

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be recovered from the unsuccessful party and where the party making the deposit is successful he is reimbursed by the inclusion of the extra twelve dollars in his judgment.

Simplification of procedure. The movements in this direction vary greatly in the different States but wherever an attempt has been made it is aimed directly at some archaic relic in our legal procedure and is sure to accomplish something in a field where efforts are sorely needed.

California has provided that in lieu of a bill of exceptions taken in the trial court an appeal may be taken by merely requesting a transcript of the record.[40]

Delaware has increased the number of jury challenges without cause to six.[41]

All defendants charged with misdemeanors in Bryan County, Georgia, shall not have the right to demand an indictment by a grand jury but shall go to trial upon a written accusation based on an affidavit.[42] This will undoubtedly expedite the business of the court but the value of such an innovation may be questioned.

Indiana is endeavoring to lessen the law's delay in appeals by providing that certain classes of cases, eighteen in number, shall pass the appellate court and go directly to the supreme court.[43] This suggests the abolition of the appellate court and the passing of the judges, rather than cases, to the supreme court as the next possible step.

Maine aims at greater efficiency in providing that justices may have hearings and render judgments in vacation time.[44]

To "expedite the administration of justice by eliminating useless technicalities and vexatious delays," Virginia provides that all courts may at any time permit any proceeding to be amended or supplemented, and further that the court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.[45]

Vermont at last says that no pleading shall fail for want of form.[46]

CLAUDE H. ANDERSON.

Indianapolis, Ind.

[40] Laws, 1915, 206.
[41] Laws, 1915, 681.
[42] Laws, 1914, 202.
[43] Laws, 1915, 149.
[44] Laws, 1915, 293.
[45] Laws, 1914, 641.
[46] Laws, 1915, 176.

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NEWS AND NOTES

PERSONAL AND BIBLIOGRAPHICAL

EDITED BY CHARLES G. FENWICK

Bryn Mawr College

Prof. John A. Fairlie, of the University of Illinois, has been assigned the general editorship of the August and November issues of THE POLITICAL SCIENCE REVIEW pending action of the executive council of the association upon the resignation of Dr. W. W. Willoughby. The department of book reviews is temporarily in charge of the editor of News and Notes.

The Pacific Coast Branch of the American Political Science Association is planning to hold its third annual meeting at Portland, Ore., in September. Mr. J. R. Douglas of the University of California is secretary of the branch, and Prof. W. F. Ogburn of Reed College, Portland, is chairman of the arrangements committee.

Prof. Alvin S. Johnson, of Cornell University, has been appointed professor of political science at Leland Stanford University.

Prof. David P. Barrows of the University of California, has been engaged in Belgian relief work at Brussels.

Prof. Raymond G. Gettell, of Amherst College, is giving courses in American government and European municipal government in the summer session of Columbia University.

Mr. William G. Avirett has been appointed assistant in political science at Amherst College.

Prof. Robert McNutt McElroy, head of the department of history and politics at Princeton University will be absent during the academic year 1916–1917, and will lecture at the request of the Chinese government in various universities of China. During his absence Prof. Dana C. Munro will act as head of the department.

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Harold Scott Quigley, Ph.D., University of Wisconsin, has been appointed instructor in the department of history and politics of Princeton University. Leonard P. Fox, Ph.D., University of Pennsylvania, has also been appointed instructor in the same department.

Dr. John Bauer, who has worked with the New York public service commission and who is a frequent contributor to scientific journals on subjects in the field of accounting and public utilities, has been appointed professor of economics at Princeton University.

Prof. Marshall S. Brown, head of the department of history and political science of New York University, has been appointed acting dean of the College of Arts and Pure Science of that institution for the coming year.

Prof. J. W. Jenks, of New York University, who has been in the far east on a six months' leave of absence, will resume his regular duties at the university in the fall.

Prof. Karl F. Geiser is conducting a course on international relations in the summer session of Oberlin College. The course is offered under the auspices of the Carnegie Peace Foundation and deals with international politics from an historical and objective point of view, especially during the period since 1871.

Dr. Robert T. Crane, assistant professor of political science at the University of Michigan, has been promoted to an associate professorship.

Dr. L. D. Upson, director of the newly established bureau of governmental research at Detroit, has been appointed lecturer in municipal administration at the University of Michigan. Dr. Upson was formerly director of the Dayton bureau of municipal research.

Prof. F. M. Anderson of Dartmouth College is conducting a course in European governments at the summer session of the University of Illinois.

Dr. John Mez, lecturer for the American association for international relations, is giving a course of lectures at the summer session of the University of Illinois.

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Mr. Henry G. Hodges, who takes his doctor's degree at the University of Pennsylvania this year, has been appointed to an instructorship in the new school of municipal administration and public service of Western Reserve University, Cleveland, Ohio.

Mr. Charles Holloway Crennan, who takes his doctor's degree at the University of Pennsylvania this year, has been appointed an instructor in the Wharton School of the University of Pennsylvania. Mr. Crennan will give courses on railroad transportation, history of economics and commerce, and economic doctrines and social problems. For eight weeks this summer Mr. Crennan will take Professor Bates' work in political science in the University of Indiana.

Mr. John A. Dunaway has been appointed an instructor in economics in the Wharton School of the University of Pennsylvania.

Mr. A. C. Hanford has been appointed an instructor in government at Harvard University; and Philip Quincy Wright, Ph.D., University of Illinois, has been appointed as assistant in international law at the same institution.

Prof. Payson J. Treat, of Stanford University, has been appointed Albert Shaw lecturer on diplomatic history at Johns Hopkins University for 1917. His lectures will deal with the beginnings of American diplomatic relations with Japan.

Mr. Robert M. Jameson, for the past three years secretary of the bureau of municipal research and reference at the University of Texas, has been appointed to the Ozias Goodwin Fellowship in government at Harvard University for the year 1916–1917. Mr. Edward T. Paxton has been advanced to the position of secretary of the bureau, and instructor in government. He will have charge of a new course to be offered in municipal research methods, intended especially to fit men for positions in municipal research bureaus.

Prof. Herman G. James, director of the Texas bureau of municipal research and reference, is preparing a volume on municipal functions, to be issued early in 1917 as one of the National Municipal League series.

Miss Alice M. Holden, who has been secretary of the bureau of municipal research at Harvard University, has been appointed to the

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staff of Vassar College, where she will organize and conduct courses in municipal government.

Stanford University is seriously considering the institution of the four quarter system. The law school has conducted summer sessions for several years, and it is generally felt that the University should remain open during the summer, which is in California one of the pleasantest seasons of the year.

Under the supervision of Prof. Benj. F. Shambaugh, head of the department of political science at the State University of Iowa, a volume on *Statute Law-making in Iowa* is being compiled for publication by the state historical society of Iowa.

Two monographs, one by Dr. Sudhindra Bose on *Some Aspects of British Rule in India* and the other by Dr. Lorin Stuckey on *The Iowa State Federation of Labor*, have recently been published by the State University of Iowa.

The Harris political science prizes, established by Mr. N. W. Harris, president of the Harris Trust and Savings Bank of Chicago, for the best essays in any department of political science and open to undergraduates of universities and colleges in Indiana, Illinois, Michigan, Minnesota, Wisconsin and Iowa, were awarded for 1915–1916 to R. J. Cunningham, University of Wisconsin, subject, "The Reorganization of the Judicial System in Wisconsin," to T. B. Bassett, Northwestern University, subject, "The Reorganization of the Legislature in Illinois," and to J. A. Swisher, University of Iowa, subject, "The Reorganization of the Executive Department of Iowa State Government." The subjects for 1916–1917 are: 1, Selection of public servants; 2, National control of railroads; 3, Problems of statute law-making; 4, International affairs: a program for the proposed League to Enforce Peace, and the military policy of the United States in relation to its foreign policy. Additional information may be obtained from Professor N. D. Harris, Evanston, Illinois.

The first annual assemblage of the League to Enforce Peace was held in Washington, D. C., on May 26 and 27. The purpose of the meeting was to devise and determine upon measures for giving effect to the proposals adopted at the conference held in June, 1915, at Independence

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Hall, Philadelphia, for a league of nations to enforce peace. Delegates were present from various organizations interested in the cause of international peace and from many of the larger universities and colleges. The meetings were presided over by the Hon. William Howard Taft and consisted of addresses by prominent publicists upon the platform of the league together with a consideration of plans for giving effect to the league program. Under the general topic of "American National Policies and the League Program," Mr. Taft discussed the constitutionality of the program, Prof. G. G. Wilson of Harvard University spoke of the Monroe Doctrine and Mr. Talcott Williams answered the objection of the danger of entangling alliances—these three being the chief addresses of interest to the political scientist. At the dinner with which the meetings closed President Wilson delivered the closing address and, while disclaiming any intention of discussing the program of the league, called attention to the fact that the United States has become, whatever its wish in the matter, a participant in the affairs of the world; and he asserted that in consequence the United States was willing to become a partner in any feasible association of nations formed in order to realize certain fundamental objects, namely, the right of every people to choose the sovereignty under which they shall live, the right of small states to enjoy equal security in sovereignty and territorial integrity, and the right of the world to be free from disturbances of the peace caused by the aggression of one state upon another.

The American Society of International Law held its tenth annual meeting in Washington, D. C., on April 27–29. The opening address was delivered by Mr. Elihu Root, president of the Society, following which a paper was read by Mr. David Jayne Hill on "The possible means of increasing the effectiveness of international law." On the general subject, "The relation of the export of arms and munitions of war to the rights and obligations of neutrals," papers were read by Profs. James W. Garner and Philip Marshall Brown. Prof. Raleigh C. Minor spoke on the topic of "The rules of law which should govern the conduct of submarines with reference to enemy and neutral merchant vessels and the conduct of such vessels toward submarines," and Profs. Amos S. Herschey and Francis N. Thorpe discussed the question, "Should the right to establish war zones on the high seas be recognized and what, if any, should be the provisions of international law on this subject?" At the last formal meeting the report of the standing committee on the study and teaching of international law was presented.

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The American Academy of Political and Social Science held its twentieth annual meeting in Philadelphia on April 28 and 29. The significant feature of the meeting was the presence of official delegations appointed by the governors of most of the States and of delegates from a large number of scientific associations and other organizations interested in the cause of international peace. The general subject of the meetings was, "What Shall the United States Stand for in International Relations?" The separate topic, "The Significance of Preparedness" gave rise to a lively discussion between the advocates and opponents of increased military and naval appropriations. The proceedings of the meeting will be published as usual in the form of a special volume to appear in July.

The committee on field work of the association of Urban Universities has issued a questionnaire directed to all instructors in American universities and colleges having supervision of field work of collegiate grade in any department of instruction. The object of the committee is to ascertain the various methods at present in use in the conduct of field work and to prepare a report incorporating the results of the investigation and recommending to the association certain standards and methods in the conduct of field work based upon the result of the inquiry. The chairman of the committee is P. R. Kolbe, Municipal University of Akron, Akron, Ohio.

The subjects for the Hart, Schaffner and Marx economic prizes for the year 1917 have been announced and include by preference the following titles: 1. The effect of the European war on wages and the activity of labor organizations in the United States; 2. Social insurance; 3. The practical working of the federal reserve banking system; 4. The theory and practice of a minimum wage law; 5. Emergency employment. In addition there is a long list of available subjects which may be obtained from the secretary of the committee in charge, Prof. J. Laurence Laughlin, University of Chicago.

The Immigration Journal is a new monthly magazine devoted exclusively to immigration, naturalization, and closely related subjects. The purpose of the journal is to discuss all phases of the problem and to present concisely and without prejudice current information concerning the immigration movement and the immigrant as a factor in the population of the United States. The editor of the journal is Mr. W. W.

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Hubbard who was clerk of the senate committee on immigration for several years and later secretary of the United States immigration commission.

"Military Service, Compulsory or Volunteer" was the general subject of the semi-annual meeting of the Academy of Political Science held at Columbia University on May 18. The subject was discussed from the point of view of fundamental principles, methods of military training, and the obligation of citizenship to the common defense.

In a brief pamphlet entitled *America's Best Defense*, Mr. Walter W. Davis attempts to suggest a program for the United States in view of the present situation in Europe. He insists that if the United States is to be drawn into the war it should only be upon an issue involving principles in which the permanent interests of mankind are embodied. These principles are then outlined, and it is urged that the United States obtain a definite statement from England (as the strongest naval power on whose side it appeared that we might be ranged) as to her attitude on those fundamental issues upon which the future peace of the world must rest.

The Macmillan Company announce the publication this summer of a volume entitled *Nationalism, War and Society*, by Edward Krehbiel, which purports to be "a study of nationalism and its concomitant, war, in their relation to civilization; and of the fundamentals and the progress of the opposition to war." The material is to be presented in outline form, as in the case of the author's *Syllabus*, prepared in coöperation with David Starr Jordan, and the aim is to state both sides of the case.

Rights and Duties of Neutrals: A Discussion of Principles and Practices, by Daniel Chauncey Brewer (New York and London: G. P. Putnam's Sons, 1916, pp. ix, 260), is largely a reprint of articles contributed by the author to the *Army and Navy Journal*, and as a discussion of the issues raised by the present war it is not without interest, though it falls very far short of being a treatise on the rights and duties of neutrals. The author proves conclusively, if any proof were needed, that many of the rules of international law set forth by the text writers fail to meet present-day conditions. His discussion of the unsatisfactory character of the present rules of contraband and the difficulties encountered in their practical application forms the most interesting

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part of the book. The style is obscure and the few conclusions drawn are wholly negative.

In a little book of 200 pages entitled *The New Public Health* (New York: The Macmillan Company, 1916) Dr. H. W. Hill, director of the institute of public health of London, Ontario, attempts to show the changes which have come over public health administration in the past twenty years and which have given rise to what he terms the "new public health." The older sanitarians were primarily concerned with factors in our environment, with water supplies, milk supplies, drainage, sewage disposal, and ventilation, hoping that by the regulation of those on a scientific basis infectious diseases might be eliminated from the community. The new public health administration, according to Dr. Hill, is primarily interested in the sick individual, and by quarantine and disinfection attempts to prevent his becoming a source of infection to others during the time he is capable of carrying disease. It is a debatable point if the author is justified in giving so much credit for this new tendency in public health administration to Dr. Chapin of Providence in view of the intensive studies of diphtheria and typhoid fever which have come from Germany and the demonstration there of what we call "disease or bacillus carriers." Whether all of Dr. Hill's conclusions are accepted or not, however, his book is a clear, concise explanation of certain new methods of public health administration which have been introduced in the past few years, and which are likely to prove of far-reaching influence in America.

Only the name of its distinguished author, William Roscoe Thayer, justifies a notice of the small volume, *Germany vs. Civilization* (Boston: Houghton Mifflin Company, 1916, pp. 238) which bears as its sub-title "Notes on the Atrocious War." After a denunciation of President Wilson's criminal silence in not protesting against the violation of the neutrality of Belgium the author describes certain ugly traits of character exhibited by the Teutonic race in the course of history and their present manifestations, but the unmeasured condemnation and the unqualified denunciation necessarily weaken the force of what is true in the indictment and are only convincing to the already convinced. Of a similar unrestrained character and possessing less intrinsic merit is the volume, *The Greater Tragedy and Other Things*, by Benjamin A. Gould (New York, G. P. Putnam's Sons, 1916, pp. 189) the gist of which is contained in the words; "If we have any appreciation of shame,

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any dislike of national degradation, any understanding of national honor, we will throw Wilson out of the office he has desecrated."

"To start with a small certainty" the volume by Marshall Kelly entitled *Carlyle and the War* (Chicago, Open Court Publishing Company, 1916, pp. 337) will never be read to the last chapter by any reader susceptible to the ordinary influences that make for dizziness. The author, if we understand him rightly, attempts to set forth the judgment Carlyle would have passed upon the present war were he alive to witness it, but in so doing he apes Carlyle's style, which only the master's touch could justify, and carries us forward through a succession of mental jolts and jars until even the most patient must despair of following the thought through the words around it. The chapters discuss in turn the concert of Europe, ostensible causes of the war, the balance of power, and the real causes of the war; but the defense of Germany must be done more harm than good by the extravagance of the statements made in its behalf. The author has done badly a task which might have been profitable if done well. The object which he had in view can best be set forth in his own words: "Briton, Frank and Russ, with all the world to help, and damn the German cur, is the Mob-cry of the hour. But Briton with German had been a better bond for peace in Europe; and, if America is ever to be a mediator, she will need to cease *her* swelling of that Mob-cry."

The Open Court Publishing Company has contributed to the literature of the war a series of volumes of varying merit, the dominant note of which is an appeal to impartiality in the judgment of America concerning the position of Germany in the war. The least convincing to the average American, it is believed, will be the volume *Belgium and Germany: a Dutch View*, by Dr. J. H. Labberton, translated by W. E. Leonard (Chicago, 1916, pp. 153). The author discusses the violation of the neutrality of Belgium from the point of view of political and moral philosophy and reaches the conclusion that with respect to the treaty of 1839 Germany's personal obligation to keep her promise was set aside by a higher moral duty, the law of release operating "whenever the living present utters commands of so high and imperative a character that the past and the ethical command of loyalty to that past must give way before them." The ethical command is in this case, of course, the necessity referred to by the imperial chancellor. But the graver matter is to reconcile Germany's release from her

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promise with the "dreadful situation in which poor Belgium finds herself today." This is done by the theory of a state with an "ethical genius," for which Germany gives greater promise than any other nation, Prussia being the "ethically sound kernel of Europe." Hence the conclusion is reached that Germany's duty to her "moral vocation" superseded her duty to respect Belgium's personality.

Above the Battle, by Romain Rolland, translated by C. K. Ogden (Chicago, 1916, pp. 212) is a plea by the well-known author of *Jean Christophe* for a saner judgment of Germany by distinguishing between the German people and their military and intellectual rulers, and at the same time a further appeal to those who influence public opinion through the press not to kindle the flames of hatred against Germany for crimes for which the people are only partly responsible. The book is eloquent in its moral appeal, but the several chapters, being a collection of contributions to the press, are disconnected and inconclusive.

Germany Misjudged, by Roland Hugins (Chicago, 1916, pp. 114) is offered by the author as "an appeal to international good will in the interest of a lasting peace" and consists of a reprint of articles contributed to *The Open Court.* Three of the chapters are in the form of open letters to Germany, England and France, and the last chapter deals with the attitude of America. The defense of Germany is on many points unsupported by other evidence than the author's statement and is frequently marked by unqualified assertions which are too sweeping to be convincing. The appeal to America to study the underlying causes of the war and to approach all parties in charity and forbearance is above criticism.

Of considerably greater value than the three preceding volumes is *Justice in War Time,* by Bertrand Russell, which consists of a number of essays, previously published separately, dealing with ethical aspects of the war, supplemented by a political essay entitled "The Entente Policy, 1904–1915," which is presented in the form of a reply to Prof. Gilbert Murray's *Foreign Policy of Sir Edward Grey, 1906–1915.* The ethical principles of the author may be summed up as a criticism of "the fundamental irrational belief, on which all the others rest, ... that the victory of one's own side is of enormous and indubitable importance, and even of such importance as to outweigh all the evils involved in prolonging the war." In sustaining this thesis the author points

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out the tendency of modern diplomacy in the hands of the aristocracy, whether of blood or of wealth, to emphasize the rivalries between nations at the expense of their solidarity of fundamental interests, and he asserts that progress in international relations will depend upon the control of foreign relations by a class of the community in closer touch with common life. The essay on the Entente policy discusses the influence of the Moroccan question in stimulating war-like feeling both in Germany and in France, as well as the effect of the Anglo-Russian entente in intensifying the rivalry between Germany and Great Britain in respect to the development of Asia Minor. A final chapter on "What our policy ought to have been" shows how on many points England pursued a policy of needless hostility to Germany and helped to increase the hold of militarism on German public opinion.

Arrangements have been made with the Macmillan Company for publishing the report of the Committee on Instruction of the American Political Science Association, presented at the Washington meeting in December, 1915. This will be issued in substantially the form of the report of the Committee of Seven of the American Historical Association; and it is expected that the volume will be on sale and ready for distribution by September 1. This report should be of service, especially to teachers in the public schools and the smaller colleges.

DECISIONS OF AMERICAN COURTS ON POINTS OF PUBLIC LAW

JOHN T. FITZPATRICK

Law Librarian, New York State Library

Attorney's Fees—Act Imposing in Certain Cases. Sorenson vs. Webb. (Mississippi. March 27, 1916. 71 S. 273.) An act imposing a penalty in a reasonable attorney's fee upon every manufacturer for failure to pay his employees once in every month is unconstitutional as discriminating in favor of other classes of employers; there is no just and proper classification providing for the imposition of such a penalty upon manufacturers in contradistinction to other employers.

Divorce—Foreign Decree. Lister vs. Lister. (New Jersey. January 3, 1916. 97 A. 170.) A decree of divorce by a court in Nevada undertaking to dispose of the status in respect of marriage of spouses

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not resident in that State is a nullity, as that State is powerless either by an act of its legislature or by a decree of one of its courts to fix the status of a person as married or unmarried when such person is only transient in that State but is actually a resident of New Jersey. There is no principle of comity which interferes with the power of the State of New Jersey to deny the right of a court of Nevada to determine the matrimonial status of such a person.

Employers' Liability Act—Jury. Minn. & St. Louis R. R. vs. Bombolis. (United States. May 22, 1916. 241 U. S. 211.) The first ten amendments to the United States Constitution are not concerned with state action; a jury verdict in a state court in an action under the employers' liability act, which is not unanimous, but which is legal under the law of the State, is not illegal as violating the seventh amendment. While a state court may enforce a right created by a federal statute, such court does not by performing that duty derive its authority as a court from the United States but from the State; and the seventh amendment requiring a verdict by the common-law jury does not apply to it.

Employment Agencies—Licensing. Brazee vs. Michigan. (United States. May 22, 1916. 241 U. S. 340.) A state statute imposing a license fee to operate employment agencies and prohibiting employment agents from sending applicants to an employer who has not applied for labor, is not unconstitutional as depriving one operating an employment agency of his property without due process of law or as denying him equal protection of the laws.

Full Crews. St. L. & Iron Mtn. Ry. vs. Arkansas. (United States. April 3, 1916. 240 U. S. 518.) The statute of Arkansas requiring full switching crews on railroads extending one hundred miles in length, is not unconstitutional as either depriving of property without due process of law or as denying equal protection of the law or as interfering with interstate commerce.

Gaming—Discrimination in Favor of Boards of Trade. Miller vs. Sincere. (Illinois. April 20, 1916. 112 N. E. 664.) A statutory provision for the recovery by the loser in any gaming, speculation or gambling device from the winner of the amount paid, except where the transaction is conducted through a regular board of trade, is invalid as

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being an unconstitutional discrimination between individuals engaged in the same business and granting special privileges and immunities to certain individuals.

Highways—Labor Thereon—Involuntary Servitude. Butler vs. Perry (United States. February 21, 1916. 240 U. S. 328.) A reasonable amount of work on public roads near his residenec is a part of the duty owed by an able-bodied man to the public; and a requirement by the State exacting such work does not amount to imposition of involuntary servitude within the prohibition of the thirteenth amendment; nor does the enforcement of such requirement deprive persons of their liberty and property without due process of law in violation of the fourteenth amendment. The object of the thirteenth amendment was liberty under protection of effective government and not destruction of the latter by depriving it of those essential powers which have always been properly exercised before its adoption. The term involuntary servitude as used in the thirteenth amendment was intended to cover those forms of compulsory labor akin to African slavery and not to interdict enforcement of duties owed by individuals to the State.

Income Tax—Constitutionality. Brushaber vs. Union Pac. R. R. (United States. January 24, 1916. 240 U. S. 1.) The income tax law of 1913 is not unconstitutional as violative of the sixteenth amendment. That amendment was obviously intended to simplify the tax situation and make clear the limitations upon the taxing power of Congress, and not to create radical and destructive changes in our constitutional system. The Constitution had recognized the two great classes of taxation as direct and indirect and applied the rule of apportionment as to the former and the rule of uniformity as to the latter. But by the sixteenth amendment all income taxes are now relieved from the rule of apportionment. Nor is the income tax law unconstitutional by reason of retroactive operation; nor as denying due process of law or equal protection of the law by reason of the classification therein of things or persons subject to the tax; nor because the provisions for collecting income at the source deny due process of law by reason of the duties imposed upon corporations without compensation in connection with the payment of the tax by others.

Income Tax—Taxation of Mining Corporations. Stanton vs. Baltic Mining Co. (United States. February 21, 1916. 240 U. S. 103.)

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There is no authority for taking taxation of mining corporations out of the rule established by the sixteenth amendment; nor is there any basis for the contention that, owing to inadequacy of the allowance for depreciation of ore body, the income tax is equivalent to one on the gross product of mines, and as such, a direct tax on the property itself, and therefore beyond the purview of that amendment and void for want of apportionment. Independently of the operation of the sixteenth amendment a tax on the product of a mine is not a tax upon property as such because of its ownership, but is a true excise levied on the result of the business of carrying on mining operations.

Labor—Right to Work as Property Right. Bogni vs. Perotti. (Massachusetts. May 19, 1916. 112 N. E. 853.) The act of 1914 declaring that the right to work shall no longer be a property right and prohibiting injunction in certain labor cases, is invalid as depriving the laborers of the equal protection of the laws, since it cuts off the right to resort to equity respecting the property right of laboring men and destroys the equality of laboring men with others. The right to work is property of which one cannot be deprived by a simple mandate of the legislature; and the mere fact that it is also a part of the liberty of the citizen does not affect its character as property.

Legislature—Determination of Election of Members. Dinan vs. Swig. (Massachusetts. April 6, 1916. 112 N. E. 91.) The act of 1913 requiring three judges of the superior court upon petition of voters to investigate an election, and upon finding any corrupt practice in the election of a member of the legislature, to enter a decree declaring the commission of a corrupt practice in his election and to certify the decree and declaration to the secretary of the commonwealth for transmission to the presiding office of the legislative body to which the defendant was elected, is violative of the prerogative vested exclusively in each branch of the general court which it alone can exercise and which it cannot delegate.

Monopolies. McFarland vs. American Sugar Co. (United States. April 24, 1916. 241 U. S. 79.) An act of the State of Louisiana relating to the business of refining sugar and creating the rebuttable presumption that any person systematically paying in that State a less price for sugar than he pays in any other State is a party to a monopoly or conspiracy in restraint of trade, is unconstitutional, the classifi-

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cation therein, if not confined to a single party, being so arbitrary as to be beyond possible justice, and the presumptions created having no foundation except on intent to destroy. The legislature may not declare an individual guilty or presumptively guilty of a crime.

Public Utility Commissioners—Powers. Public Service Elec. Co. vs. Board of Public Utility Commissioners. (New Jersey. March 6, 1916. 96 A. 1013.) The act conferring upon the board of public utility commissioners power to require every public utility to comply with the laws of the State and municipal ordinances and to conform to the duties imposed upon it thereby or by the provisions of its charter, does not confer upon the board the power to decree the specific performance of a contract; the latter is an equitable power exclusively inherent in the court of chancery; and even if the act in express terms had bestowed such a power upon the board, it would have been an unlawful invasion of the court's exclusive prerogative.

Removal of Causes to Federal Courts—Prohibition by States. Wisconsin vs. Phila. & Reading Coal Co. (United States. May 22, 1916. 241 U. S. 329.) A provision of the state statute providing for the revocation of the license of a foreign corporation to do business within the State in case of removal, or application to remove, any action commenced against it by a citizen of that State to a federal court, is unconstitutional; the judicial power of the United States is a power wholly independent of state action, which the states may not directly of indirectly destroy, abridge or render inefficacious.

Rendition of Criminals between States. Innes vs. Tobin. (United States. February 21, 1916. 240 U. S. 127.) Prior to the adoption of the Constitution fugitives from justice were surrendered between States conformably to what were deemed to be the principles of comity. Article four of the Constitution is intended to embrace fully the subject of the rendition of such fugitives between the States and to confer upon congress authority to deal with that subject. Section 5278 of the revised statutes which was enacted by congress under the authority vested in it by the Constitution for the purpose of controlling interstate rendition was intended to be controlling and exclusive of state power; and this section expressly or by necessary implication prohibits the surrender in one State for removal as a fugitive from justice to another State of a person who clearly was not and

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could not have been such a fugitive from the demanding State. However, the doctrine of asylum applicable under international law, by which a person extradited from a foreign country cannot be tried for an offense other than the one for which the extradition was asked, does not apply to interstate rendition.

Taxation—Corporations—Interstate Commerce. Kansas City Ry. vs. Kansas. (United States. February 21, 1916. 240 U. S. 227.) The tax imposed by Kansas laws of 1913, chapter 135, on the privilege of being a corporation is not laid upon interstate commerce or receipts therefrom, fluctuating with the volume of interstate business, but is simply graduated according to paid up capital with a reasonable maximum; and it is not, as to a domestic corporation engaged in both interstate and intrastate commerce, invalid either as a violation of the commerce clause as taxing interstate commerce or of the due process clause of the fourteenth amendment as taxing property beyond the jurisdiction of the State.

Theaters—Right to Admission. Woollcott vs. Shubert. (New York. February 22, 1916. 111 N. E. 829.) Under the common law, the theater, though affected by public interest justifying licensing, is in no sense public property nor governed by the rule relative to common carriers or other public utilities, and the proprietor's right to and control of it is the same as that of any private citizen in his property and affairs, so that he may admit or exclude persons at his pleasure. The civil rights law of the State of New York providing that all persons shall be entitled to full and equal accommodation in all places of public accommodation or amusements and providing a penalty for violation in denying admission to citizens upon the ground of race, creed or color, does not destroy the common-law right to exclude persons from theaters where the rule of exclusion applies alike to all persons, and is not based on race, creed or color.

Torts—Jurisdiction of Causes of Action.—Actions under Statutes of Foreign Countries. Hanlon vs. Frederick Leyland & Co: (Massachusetts. March 9, 1916. 111 N. E. 907.) An action to recover damages for a tort is transitory, and can be maintained wherever the wrongdoer can be found. So the plaintiff by comity will be permitted to maintain an action in the courts of this commonwealth, under an English statute allowing an action for tort, although no right of prop-

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erty, under the statute, was vested in the deceased which survives to his personal representative.

Trading Stamps—Constitutionality of Act Imposing Prohibitive License Taxes. Rast vs. Van Deman & Lewis. (United States. March 6, 1916. 240 U. S. 342.) The act of the State of Florida of June 5, 1913, which imposes a state license tax of $500 and a county license tax of $250 upon any person, firm or corporation offering trading stamps or profit sharing certificates redeemable in premiums, the license fees imposed being in addition to any other license fees or taxes, is not unconstitutional even though the license taxes as imposed are prohibitory; the right to carry on business by using trading stamps is not so protected by the federal Constitution as to render a tax thereon a violation of the due process provision of the fourteenth amendment. The statute is not open to objection as depriving of liberty and property without due process of law on account of the severity of its penalties so as to intimidate against testing its legality. A classification based on differences between a business using and one not using such stamps is not so arbitrary as to deny equal protection of the law. A distinction in legislation does not deny equal protection of the laws if any state of facts can be conceived that will sustain it; and, even though such facts or their effect may be disputed, courts cannot arbitrate such differences of opinion. It is for the legislature to discern and correct evils not only of definite injury, but also such as are obstacles to greater public welfare if within legislative authority, as is the use of such stamps. See also Tanner vs. Little, 240 U. S. 369; Pitney vs. Washington, 240 U. S. 387; State vs. Underwood, 71 S. 513.

Weights and Measures. Armour & Co. vs. North Dakota. (United States. April 3, 1916. 240 U. S. 510.) The net weight lard statute of North Dakota, which requires lard, when not sold in bulk, to be put up in containers holding a specified number of pounds net weight or even multiples thereof and labeled as specified, is not unconstitutional as denying equal protection of the law or as depriving of property without due process of law; nor is it, as to packages sent into the State and afterwards sold to consumers by retail, unconstitutional as an interference with interstate commerce.

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BOOK REVIEWS

The Political Writings of Jean Jacques Rousseau. Edited from the original manuscripts and authentic editions with introductions and notes by C. E. VAUGHAN, M.A., Litt.D. In two volumes. (Cambridge: at the University Press. 1915.)

The entire body of Rousseau's writings on politics is here collected together and provided with the necessary commentary both textual and explanatory. Besides the *Économie politique*, the first draft and final version of the *Contrat social*, and the works on the government of Corsica and of Poland, the edition includes the *Discours sur l'Inégalité*, the important fragment on *L'État de Guerre*, passages from *Émile* of a definitely political character, especially the sketch of political theory in book v, illustrative excerpts from other non-political writings, the last four of the *Lettres de la Montagne*, and various minor pieces. Notwithstanding the diligence of former workers in the same field, especially MM. Dreyfus-Brisac, Windenberger, and Dufour, Professor Vaughan has been able to glean, generally from the Rousseau manuscripts at Neuchâtel, a considerable number of hitherto unpublished fragments, most of which are, however, mere variants of accepted texts. Of this new material by far the most interesting part is the series of eight autobiographical fragments, including the original draft of the close of the fifth *Lettre de la Montagne*, gathered together in an appendix. Though of interest to the student of Rousseau the relation of these fragments to his political writings is so remote that one wonders at their inclusion here. In the same appendix are found two early versions of the opening of *Les Confessions* that have already been printed. Why, then, reprint them here? Another matter of arrangement might have been managed better: Diderot's article on *Le Droit naturel*, reprinted because of its close association with the *Économie politique* and the *Contrat social*, should certainly have been relegated to an appendix.

Professor Vaughan has spared no effort to establish a definitive text of these writings and it is to be wished that the same patience might be applied to the whole body of Rousseau's work, for current editions, notably that of Hachette which is the most accessible, abound in small errors. The editor's finest achievement in the field of textual recon-

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struction lies, however, where two excellent scholars—Dreyfus-Brisac and Windenberger—had preceded him: minute examination of the awkwardly grouped pages of the MS. of *L'État de Guerre* resulted in the discovery that a rearrangement of the order of the pages clarified, and did away with breaks in, the course of Rousseau's argument. The fragment is now printed in accordance with this discovery.

Short special introductions to each piece deal with matters of biography and literary history and with such details as did not fall conveniently within the limits of a general discussion. An elaborate introduction to the whole collection—"Rousseau as Political Philosopher"—centres in the thesis that "two strands of thought, the abstract and the concrete, lie side by side in his [Rousseau's] mind; forever crossing each other, yet never completely interwoven; each held with intense conviction, but each held in entire independence of the other" (p. 77). Theories derived largely from Locke undergo a self-contradictory change when under the influence of Montesquieu Rousseau applies them to **actual** conditions. Rousseau worked under the self-imposed handicap of acceptance of "the state of nature" and of "the social contract," matters of no inconvenience so long as he is the exponent of abstract individualism (as in the *Discours sur l'Inégalité* and in the opening pages of the *Contrat social*) but impossible fully to reconcile with the practical collectivism of the latter part of the *Contrat social* and of his later writings upon politics. Professor Vaughan makes no attempt to harmonize completely these two strains in the *Contrat*; indeed he recognizes that no sooner has Rousseau brought the individual to a total surrender to the service of the state than by qualifications and concessions he readmits a measure of individual liberty. The freedom possessed by the citizen of Rousseau's ideal state is "the release from the bondage of his baser self; the willing acceptance of burdens for the sake of others, of that service to a larger whole in which alone his true self, his real freedom, is to be found. In other words, it is essentially a moral freedom; a freedom which brings with it at least as much of self-sacrifice as of ease" (p. 113). What Rousseau, blind to the idea of progress, failed to see is that this ideal is a matter of gradual growth from barbarism during which time the discipline of force has been ever so slowly diminishing and the element of right as gradually taking its place. It is the acceptance of the contract idea at the very moment that he admits the non-existence of pre-social morality (thus leaving the contract without any sanction whatever) that involves Rousseau in contradictions. Of this he was himself dimly aware and his later work is

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evidence of increasing realization of the value of the historic method and of the importance of the influence of climate, environment, and (though this is barely suggested) the past circumstances of a people; the state of nature and the contract are left behind; Montesquieu is substituted for Locke. Yet here, as in the case of his individualism and collectivism, the contradictions never disappear.

The volumes close with two further contributions from Professor Vaughan's pen. In an "Epilogue" written since the beginning of the War he contrasts the Roussellian idea of the state with that held by Fichte, the one that of national independence with the small, rather than the large, state as the unit, the other that of the domination of one state over the whole of Christendom. There is no effort to conceal the application of the result of this comparison to the diverse claims and ideals of the rivals in the present struggle. Finally, an appendix is devoted to a lecture, originally delivered at Leeds, on "Rousseau and his Enemies" in which are set forth the conclusions reached by Mrs. Frederika Macdonald in her *Jean-Jacques Rousseau, a New Criticism*, 1906, especially with regard to the reliability of the *Mémoires* of Mme. d'Epinay. It is noteworthy that Professor Vaughan entirely ignores Mrs. Macdonald's able defence of Rousseau against the long-standing charge of having delivered his five new-born children, one after the other, to the foundling hospital. The lecture is in quite popular form, it contains nothing not accessible in greater detail in other works, it has only the remotest relation to the political writings of Rousseau; and for these reasons is rather out of place as a conclusion to this work.

SAMUEL C. CHEW.

Vicarious Liability. By T. BATY. (Oxford: The Clarendon Press. 1916. Pp. 244.)

It may be said to be a general principle of the common as well as of the civil law that one person shall not be held liable in damages for the tortious act of another. At any rate this may be said to be so since the disappearance of the old doctrines of family, tribal, and other group forms of collective responsibility. There have always been, however, and still continue to exist certain exceptions to the rule which are expressed in such phrases as *respondeat superior* and *qui facit per alium, facit per se*, not to speak of the liability of the father for certain acts of his child. The justice as well as the legal scope of the doctrine is,

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however, put to a test when this vicarious liability of the principal or employer is imposed with reference to acts which, though within the possible scope of employment, have not in fact been authorized, and may indeed have been expressly forbidden by the one who is held liable in damages for their commission. This doctrine upon both its ethical and legal sides becomes an especially important one in the field of industrial disputes when applied to the liability of trade unions or their members for the acts of their officers or other persons who may be construed to act as their agents. The ethical and juristic basis for this liability without moral or more than constructive legal fault is of course also involved in workmen's compensation acts. In the book under review the author has searched out with evident industry the cases in the English courts in which vicarious liability has been violated, and has examined with critical analysis the arguments which the court opinions have advanced, and the volume thus furnishes a valuable chapter in historical jurisprudence. Upon the whole, the principle under examination, in its modern applications at least, is found to be "dubious in origin and unjust in operation." The real reason for the present rule the author finds in the fact that, generally speaking, "the damages are taken from a deep pocket." The reviewer doubts whether these are wholly justified conclusions. Starting from purely individualistic premises, it may be impossible to defend certain forms of vicarious liability which the courts of England and the United States now support; but, socially viewed, they may in most cases be justified. Thus while it may be true that the liability is imposed because the damages are taken from the deeper pocket, the principle is not necessarily "unjust in operation" when regarded from the standpoint of true social philosophy.

A final chapter is devoted to vicarious criminal liability, and here it would seem that Mr. Baty is fairly justified in the statement that "the law is in a state which it is not too much to call discreditable to English jurisprudence. Vicarious criminal liability is imposed haphazard and with an arbitrary hand." W.

Il Fine dello Stato. By ALESSANDRO BONUCCI. (Athanaeum: Rome. Pp. 452.)

Among recent developments of significance to political science none is more noteworthy than the extraordinary productivity at the present time of Italian scholars. In the fields of international law, of consti-

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tutional law, of administration, and of political theory, their work is extensive and of growing interest to the foreigner. If their science has for the most part been primarily German, it is nevertheless developing characteristics of its own which, it may be hoped, will lead to yet more important contributions to the political literature of the world.

The author of the present work on the ends of the state is professor of the philosophy of law at the University of Siena. His former works have dealt as much with pure philosophy and ethics as with jurisprudence, and the philosophical attitude dominates in the treatise now under review.

Asserting that in common opinion law is the principal, if not the exclusive, source of knowledge of the will of the state, the author shows that law is perfectly distinct from that will, much as effect is from cause. The will of the state is exerted upon its organs; the will of the state and the action of its organs together constitute the personality of the state. The will of the state finds expression in legal norms or rules; and these rules are evidenced by positive laws. The existence of legal rules must be considered as separated from their content. Both their existence and content are expressions of the will of the state directed to its organs. The will of the state expressing itself in law has thus two separable ends: an ideal end involved in the very existence of law, and an actual end determinable by reference to the rules embodied in an existing system.

The end of the state and the justification of the state are inseparable. It is by its ends, ideal and actual, that the state must be justified. Particular laws must be related to the actual end. Law in general is justified by the absolute duty and hence necessity of the state, as the most suitable instrumentality, to promote that personal liberty which is the highest aim of the individual.

ROBERT T. CRANE.

The American Year Book. A Record of Events and Progress. 1915. Edited by FRANCIS G. WICKWARE. (New York and London: D. Appleton and Company. 1916. Pp. xviii, 862.)

With this issue *The American Year Book* reaches its sixth volume. In general arrangement there is no departure from the previous issue. One slight change has added greatly to the convenience of those using the volume, that is, on the back of the cover the words "Record of the Year 1915" have been added, thus aoviding the confusion that other-

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wise inevitably arises between the year of publication and the year covered by the contents. The present volume, like its predecessor, is divided into thirty-three sections or departments. While it covers such subjects as education, literature, art, archaeology, religion, anthropology, chemistry, physics, geology, mathematics, astronomy, and the medical sciences, over half of the volume is devoted to current history, political science, and economics. A larger amount of space than usual is devoted to the sections on American history, international relations, and foreign affairs, and probably nowhere else in the same compass can a student find as much valuable and accurate information in regard to the relation of the United States to the European war. This material, vast in extent, has been admirably digested and arranged for convenient reference.

C. G. F.

William Branch Giles: A Study in the Politics of Virginia and the Nation from 1790 to 1830. By DICE ROBINS ANDERSON. (Menasha, Wis.: George Banta Publishing Company, 1914. Pp. 271.)

Though not a statesman of the first order, Giles occupied a prominent place in the political arena of his day and generation. He was successively a member of the Virginia Assembly, of the national house of representatives, and of the United States senate, and after a period of retirement on account of ill health he closed his career as governor of Virginia and a member of the famous constitutional convention of 1829–1830. In the house of representatives he was majority leader under Jefferson and in the senate he was chairman of the foreign relations committee during the critical years preceding the War of 1812.

In politics he was a Republican, a friend and confidential adviser of Jefferson, and an enemy of Hamilton. He supported Madison for the presidency, and became leader of the administration forces in the senate, but as a friend of the Smiths he was hostile to Gallatin and opposed the appointment of Monroe as secretary of state. Thereafter he freely criticized the conduct of foreign affairs, and finally became an open advocate of war. With the death of John Taylor of Caroline and Judge Spencer Roane, Giles became the foremost advocate of strict construction and state rights, and one newspaper article after another came from his pen. He complained of the intolerable conditions imposed upon the South by the tariff, and pointed out that in

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view of the vast amount of southern exports and the dependence of Europe upon southern cotton, secession might not be an inexpedient step for the South. Giles was a forceful speaker, a formidable debater, and a ready writer, but his style was vituperative and his point of view partisan. Professor Anderson has performed his task well and produced an interesting volume.

JOHN H. LATANÉ.

Abraham Lincoln: The Lawyer-Statesman. By JOHN T. RICHARDS. (Boston and New York: Houghton Mifflin Company. 1916. Pp. vii, 260.)

Few statesmen have faced such complicated and baffling problems as those which confronted Abraham Lincoln during the vexed years from 1860 to 1865. Few statesmen during such a period have met with so much hostile criticism, some justified, much unjustified. Even his own party failed to give him the united support that might reasonably have been expected, and the man who today is hailed with nearly universal praise was then the subject of abuse and even vilification. From his own party he often received half-hearted and grudging support; the Abolitionists, many of whom differed with him on methods and policies, criticized him bitterly; while the Democrats, realizing that he owed his election in 1860 to a split in their ranks, hailed him as a minority President, blamed him for most of the evils that had fallen upon the country, and poured out upon him the vials of their wrath. Indeed, so popular is the memory of Lincoln today that there is danger of the real Lincoln being obscured by the Lincoln of myth and hero-worship. There is danger that the difficulties of his administration, which were often increased by criticism and lack of united support, may seem small in light of the view of Lincoln which obtains generally today. Even the best of the biographies of Lincoln, the pretentious work of his secretaries, Nicolay and Hay, suffers from the fact that they were too close to their beloved chief to be entirely impartial and often saw the object of their friendship and youthful service out of perspective—Lincoln appearing too large and the other men who worked with him or who opposed him too small. The character and work of Abraham Lincoln still offer fruitful fields for historical investigations, and it is not unlikely that the true biography of the real Lincoln is yet to be written. Before such a work can be produced there are certain phases of Lincoln's private and political career that must be carefully investi-

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gated and the results of such investigation presented in a clear and concise manner. The value of the work of Mr. Richards lies in the fact that it is work of this character.

The author, as he states in his preface, has no intention of writing a complete biography of Abraham Lincoln. His work is a presentation of the results of his investigations into "the record of Abraham Lincoln as a lawyer, his views upon the subjects of universal suffrage and the reconstruction of the Confederate state governments at the close of the Civil War, and his attitude toward the judiciary, upon which there has been considerable misunderstanding in recent years. To these there has been added a chapter devoted to some consideration of his standing as an orator."

By far the most important part of the book is the part dealing with Mr. Lincoln's legal career. The chapter entitled "In the Courts" contains a thorough discussion of Mr. Lincoln's legal practice and descriptions of the most important cases in which he appeared as an attorney-at-law. In an appendix the author has given in concise form the one hundred and seventy-five cases in the supreme court of Illinois in which Mr. Lincoln appeared as counsel. As this court was the only appellate tribunal and the court of last resort in the State of Illinois during the period of his professional activities, a study of these cases is essential to any fair judgment of Mr. Lincoln's legal ability and the scope and character of his practice. Here also are given the two cases in which Mr. Lincoln appeared before the bar of the supreme court of the United States. From the evidence thus presented Mr. Richards concludes that Mr. Lincoln was a capable lawyer of high standing, whose reputation as a lawyer was forgotten by the men of his day because it was soon "overshadowed by the greater labors and accomplishments of Abraham Lincoln, the profound statesman and the savior of his country." Here he takes issue with the view of Mr. Joseph H. Choate who held that Lincoln although a great President was not an accomplished lawyer. Mr. Richards believes that it was Mr. Lincoln's greatness as a lawyer that made him a great President, and that enabled him to grasp the paramount issue of the Civil War, namely, the preservation of the Union.

In clearly pointing out the attitude of President Lincoln toward the southern States during the Civil War, and his policy for the reconstruction of the State governments in them, Mr. Richards has done a good piece of work. He shows that President Lincoln "sought to aid and encourage those States to reëstablish themselves as members of

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the Union. He was never inclined to force negro suffrage upon them, but believed that the States should be left free to grant or withhold the right of suffrage as each State might determine for itself." Of the fact that Lincoln was opposed to the system, now known as "Carpet-Bag Government," he offers conclusive proof by well-chosen citations from Lincoln's writings.

Regarding the oft-repeated claim of the advocates of woman suffrage that Mr. Lincoln favored their cause, Mr. Richards finds only the well-known statement: "I go for all sharing the privileges of the government who assist in bearing the burdens. Consequently, I go for admitting all whites to the right of suffrage *who pay taxes or bear arms* (by no means excluding females)." As this statement was made when Lincoln was only twenty-seven years of age, and as it constitutes the only mention of votes for women by Mr. Lincoln, notwithstanding the fact that the Woman Suffrage Movement had reached considerable proportions by 1850, Mr. Richards concludes that there is not sufficient evidence to warrant the statement that Mr. Lincoln favored woman suffrage; nor is there evidence, on the other hand, to prove that he opposed it.

Lincoln's criticism of the decision of the supreme court of the United States, in the case of Dred Scott vs. Sanford, has been often referred to in recent years to justify assaults upon the courts, and as an argument for the recall of judicial decisions. Mr. Richards shows conclusively that a careful review of all that Mr. Lincoln said upon the subject shows that he was a "firm believer in and champion of the independence of the judiciary." He shows that the main criticism of the Dred Scott decision, made by Mr. Lincoln, is a criticism of the *obiter dicta*, in which he held that the majority of the justices had exceeded their authority and had undertaken to decide matters not properly before the court. There seems to be little in Mr. Lincoln's criticism of this case on which to base some of the attacks on our courts that claim to be justified by it.

On the whole, Mr. Richards' book is well written and will amply repay a careful reading. The last chapter adds little to our knowledge of Lincoln, and one regrets the fact that it was included, as it seems hardly up to the standard of the other chapters. The book is the result of careful study and investigation of records of the Illinois courts in which Mr. Lincoln practiced.

JAMES MILLER LEAKE.

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City Planning: A series of papers presenting the essential elements of a city plan. Edited by JOHN NOLEN. (New York and London: D. Appleton and Company, 1916. Pp. xxvi, 447. National Municipal League Series.)

While the output of books, pamphlets, and periodical articles on city planning has been far from meager during these last few years, the greater number of these publications have been neither comprehensive in their scope nor practical in their suggestions. Mr. Nolen's volume possesses both of these qualities. In addition, it offers itself primarily as a handbook for the layman, for the conscientious citizen who would keep abreast of the times, and it hopes also to be of value to city-planning enthusiasts by its fund of varied and useful information. The book seems to live up to its purpose.

Seventeen experts contribute the eighteen chapters of the book, dealing with as many different phases of the general subject. There is a logical arrangement of topics, progressing from the introduction and a chapter on the general subdivision of land, through a consideration of each of the physical features which affect city life, such as streets, buildings, recreation facilities, water supply, transportation on water and land, rapid transit, and industrial and residential decentralization, to the details for the actual accomplishment of a city plan, the methods for setting to work and for financing it, with a concluding chapter on city-planning legislation in the United States and Canada. The more general chapters in the book are, perhaps, most interesting, as, for example, the introductory chapter by Mr. Frederick Law Olmsted, and those on "City Financing and City Planning" by Mr. Flavel Shurtleff and on "City Planning Legislation" by Prof. Charles Mulford Robinson. To those not familiar with city-planning methods Mr. George Burdett Ford's contribution on "Foundation Data for City Planning Work" is especially illuminating and suggestive. Some of the chapters on the more technical phases of the subject will possibly prove less clear to those readers who have not already become acquainted with the general principles and problems of city planning.

In general form the composite volume is excellent and sets a high standard for similar undertakings. To this several features contribute: the progress from one chapter to the next, with its different topic, is natural and easy; the transition from one author to another is not too noticeable; each subject receives to some extent the same general treatment;—in short, the editor's work has been cleverly and carefully done.

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There is, possibly, too much attempt at interrelation in the matter of cross-references, etc.; these are skillfully arranged for the most part, but in some portions of the book they occur so frequently as to give an impression of artificiality. Ten pages containing a short biographical notice of each contributor precede the table of contents. There are many interesting illustrations and tables throughout the volume; but a few of these tables—for instance, those in the chapter on "Navigable Waters," showing tonnage per unit of water and land surface and per unit length of wharf, and length of wharf per thousand population—appear to be of doubtful value in a book which makes its chief appeal to the general reader.

In a coöperative volume some repetition is hardly avoidable; yet three separate explanations of excess condemnation seem over many, besides giving opportunity for discrepancies in statement. A short list of references is appended to each chapter and a ten-page general bibliography concludes the volume. The book has been well printed and the proof reading is exemplary; there are practically no typographical errors save the page reference given in the foot-note on page 401.

A. M. H.

The Law and the Practice of Muncipal Home Rule. By HOWARD LEE MCBAIN. (New York: Columbia University Press. Pp. xviii + 724.)

This generous volume represents by far the most complete and comprehensive study of municipal home rule in the United States that has yet appeared, and as such will be welcomed by all students of that interesting and important subject. The book is divided into two unequal parts. Part I, comprising about one-seventh of the book, is concerned with the origin and development of the home rule problem. It gives the history of the constitutional limitations on the power of state legislatures over cities, other than those involved in the grant of charter making powers to cities. This first and less important part of the work contains little that is new, but gives a concise and readable presentation of that phase of the subject.

The second part of the book takes up the situation in the twelve so-called "home-rule" States, that is, those in which cities have been granted the right by constitutional amendment to frame their own charters. The method of treatment is by States, taking each State

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up in order and discussing the law and practice in that State. But the continuity of the treatment is preserved by numerous cross references in the text. The specific questions that have been raised in each of the States in suits involving an interpretation of the home rule powers are discussed in the light of the decisions. Naturally a great deal more space is devoted to the States which have had the home rule provisions longest in operation and in which consequently the largest number of cases have arisen. Hence more space is devoted to home rule in Missouri and California, than to all the ten other States combined.

The final chapter of the book contains some general conclusions drawn from the study of the experiences of the home rule States. It is put in the form of twelve specific questions with regard to the machinery and powers of home rule. This chapter should prove to have the most practical value of any in the book, for it makes concrete suggestions with regard to the fundamental problems involved in drafting home rule constitutional provisions. There is no question that within a decade municipal home rule provisions will be inserted in nearly all of the 36 state constitutions that do not now have them. In helping to avoid the legal and practical difficulties encountered in the States that already have these provisions this volume should prove of great service. As a careful and painstaking study of an important subject in public law it is a valuable contribution to the literature of the subject.

HERMAN G. JAMES.

A Model City Charter and Municipal Home Rule. As prepared by the Committee on Municipal Program of the National Municipal League. March 15, 1916.

The National Municipal League now lays before the public its "Model City Charter and Municipal Home Rule" prepared by a committee of distinguished experts in American city government. This document is a thorough revision of, or rather a substitute for, the League's original "Municipal Program," adopted more than fifteen years ago and it represents the mature judgment of that Association which has done such notable service in promoting thinking about city government in the United States. As such it will be gratefully received by students and publicists everywhere and it will doubtless be used as a guide by many a city engaged in charter revamping.

The scheme of government set forth in the document before us is simple in form. It is the commission manager type, supplemented by

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the initiative, referendum and recall that is commended to the suffrages of American citizens; but there are some signs of misgivings on the part of the committee. Footnotes inform us that the sections on the initiative, referendum, and recall were adopted by "majority vote of the committee." Moreover, there is some uncertainty as to whether the commission manager plan is the last word in municipal revelation. The committee modestly suggests that it is "probably the most advanced and scientific form of municipal organization yet suggested." Proportional representation and preferential voting plans are placed in the form of appendices for those who seek guidance in such matters.

The League's program falls into two main parts: (a) home rule and (b) the structure and powers of the government. The first part shows that the committee has given thought to the most vital aspect of that thorny question, namely, the precise powers to be conferred upon the city by state constitutional amendment. The kind of a charter which a city may adopt under the committee's provisions is one "for its own government." That is, as we all know, a vague phrase, and one not worth quarrelling over. The powers which the city enjoying home rule are to have are those "relating to municipal affairs." That phrase also is a sort of omnibus measure for the home rule reformer; but the committee is quick to add that certain specific powers shall be granted, lest the blanket clause should smother the city which it covers. The specific powers conferred relate to taxation, local public services, local public improvements, education, and police and sanitary measures. Just what rights are granted by the supplementary bill of particulars only an encyclopaedic treatment, as Professor McBain has so abundantly demonstrated, could unfold. To the poor, distrusted state legislature—the people's tribunes—the League would leave merely the general authority to enact general laws relating to state affairs, applicable to all cities of the State alike.

As to the second part, namely the structure of government, the League places its faith in the small council elected for four years on a general ticket at large, subject to the recall. This council is to elect the city manager and stick to legislative business. Its motto is to be *ne sutor ultra crepidam*. "Except for the purpose of inquiry the council and its members shall deal with the administrative service solely through the city manager nor shall any member thereof give orders to any subordinates of the city manager, either publicly or privately. Any such dictation, prevention, orders, or other interference on the part of a member of council with the administration of the city shall be deemed

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a misdemeanor." Surely this is depriving an alderman of his liberty without due process. One cannot help but admire the temerity of the committee and hope that its moral aspirations may be more than fulfilled. The Social Democratic member of the German city council could not get a job with the bürgermeister for his nephew before the Great War began, but it seems that even that chasm has been bridged by fraternal sacrifice. The initiative, referendum, and recall sections occupy ten pages of the program.

The League would put the administrative services of the city under the supreme direction of the city manager, for the mayor is to be a mere figure head—commissioned to open bazaars, review parades, receive Marathon runners, and render similar public services. The manager is to be appointed by the council for an indefinite term. He may be removed by the council. Why should he not be allowed to appeal over the heads of the council to the electors in case of a dead lock or a quarrel? Under the committee's scheme the manager is always up against the wall with a pistol at his head. Why not put the council up against the wall by allowing the city manager to dissolve it? The manager is to carry on the city's business with six department heads under his control and "in each case the man must have rendered active service in the same department in this or some other city." Evidently there are to be no women department heads in the League's scheme of things. This requirement of actual service as a prerequisite for departmental heads is an admirable idea, and it is to be hoped that the principle will be widely adopted and acted upon. We have too long been the victims of amateur administration.

The civil service provisions of the League's program are clear and full and represent, I believe, the most approved thought on that subject. The civil service board is to be appointed by the council. Many will doubtless dissent from this proposition, but the answer is that civil service commissioners must be appointed by some human authority. The sections on the budget are precise and apparently adequate. The committee has succeeded admirably in bringing this vague subject down to concrete legal statement. The division on public utilities embraces in analytical form the general principles which have already been enunciated by the League on other occasions. There is also to be a city planning board of an advisory character.

Adequate evaluation of the document before us would call for a treatise on municipal government and administration. Anyone who has studied the history of constitutions knows how fallible the human judg-

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ment is. The best laid plans have sometimes gone wrong and the impossible have succeeded. It would be easy to pick out any number of the League's propositions and make some display of erudition gratifying to the author. There is nothing esoteric about the program. The proposals are for the most part clearly put and the language employed is far more precise and definite than one usually finds in city charters. The document is stripped of verbiage and compact in form. Some of the sections, such as those on the initiative and referendum might have been reduced, and more faith put in ordinances, but the good and wise will differ on this point. As a whole, the League's program will undoubtedly prove to be a new milestone in the history of American city government, recording many genuine achievements and telling of better things to come.

CHARLES A. BEARD.

English Public Health Administration. By B. G. BANNINGTON, (London: P. S. King & Son. 1915. Pp. 338.)

The complicated system of public health regulations in vogue in England and the practical difficulties encountered by its administrators are well known to all students of hygiene who will welcome this volume of Bannington's as likely to throw some much needed light on the subject. As pointed out by the author, English sanitary law is largely a system of special acts designed to cover particular circumstances, beginning with the year 1774 when parliament passed an act to secure the health of prisoners. This was followed by acts regulating the health and morals of apprentices and mill operatives in 1802, "the first of a long series of factory acts." Under the influence of Chadwick and as a result of the public knowledge of the unsanitary conditions existing in England a general board of health was established in 1848. This board which seemed likely to systematize sanitary legislation survived only ten years, and in consequence special act has been added to special act until the duties and powers of sanitary officials are almost impossible to define. The great merit of English sanitarians lies in their ability to carry out sanitary reforms on the basis of this complicated legislation and the author gives us an excellent insight into the difficulties which beset the sanitarian and the way he avoids them. After an historical chapter of some 11 pages, 26 chapters are devoted to particular topics such as sources of powers, local legislative procedure, administrative organisation, etc. The duties of the medical officer of

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health are well explained in Chapter VIII and those of the inspector of nuisances in Chapter IX and the friction encountered when two administrative officials with approximately equal powers occupy the same territory. Chapter XII dealing with the right of entry and Chapter XIX treating of sanitary authorities and the courts are especially valuable to the American student of public health. The great need of sweeping reforms in English sanitary law and administration is well recognized by the author, while the prediction is made by Graham Wallis of London University, who writes the introduction, that this reform is likely to date from August, 1914, which month, he says, marks the passing of an old epoch in Great Britain and the beginning of a new.

This publication of Bannington's, we feel sure, will prove of great assistance to all those desiring to understand English public health administration.

W. W. FORD.

Transportation Rates and their Regulation. By H. G. BROWN. (New York: The Macmillan Company, 1916. Pp. 347.)

In the volume before us Professor Brown furnishes an interesting and extended study of a very large and difficult subject within the compass of some three hundred pages. The elements constituting the costs of transportation are discussed in detail and classified with especial reference to the effect of each on the question of rates. The study is one concerned with the determination of rates for American railroads, and the discussion of the elements involved and of the methods of solving this large and intricate problem is principally economic, although it is supplemented with legal theories and illustrated with actual cases.

The evils of discrimination in rates are restated and their unfair and undesirable consequences are set forth at length. Monopolies and protective tariffs are considered in this connection and comparisons are made which will hardly be acceptable to advocates of the doctrine of protection. For this reason and to this extent the illustrations and comparisons are unfortunate, as they challenge the reader's opinion on the debatable issues of the tariff and thus inject difficult political problems into the discussion of rates, which in itself is sufficiently involved and offers quite enough problems of its own.

The fundamental elements which constitute the costs of transporta-

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tion and the competitive features of the problems incident to rate regulation are discussed with as much detail as the compass of the book permits, and these are illustrated with a sufficient number of cases to make it practical. The development of the theory of rate regulation of our railroads is described and the history and practical utility of the interstate commerce commission is set forth in an interesting manner while many leading decisions and rulings of the commission are discussed.

OSCAR L. POND.

Why War. By FREDERICK C. HOWE, Ph.D., LL.D., commissioner of immigration at the port of New York. (New York: Scribner's. 1916. Pp. xvi and 366.)

This work is perhaps sufficiently important to warrant its being noticed in a critical journal, but its character is not that of the writings which usually should be examined there. It is affected with such grave faults that the reviewer must speak with less appreciation than its merits would prompt him to do. Not always does it reveal the careful thinker or the well trained historical writer. The author's ideas are larger than his knowledge or his comprehension of historical relations and development. His penetration is less profound than his manner, his condemnation is too ready, his suspicions too certain, his solutions too easy and thorough. Moreover, in the technique of his reasoning and composition he mistakes assertiveness for force, positiveness for certainty, speculation for positive knowledge. These strictures are made with the uneasy feeling that often a reader or a critic in the seclusion of his study will discover such failings in the midst of attempts at constructive thinking and generous desire to make better the affairs of this world, efforts which in many instances the mere critic never could make himself; but nevertheless things are noted which have attracted attention along with excellent qualities which the book does possess. The writing is at times careless and bears evidence of haste in composition, though for the most part it is so clear and forceful that the reader will not wish to lay the book aside. It is not free from errors, but it also contains large ideas and vigorous thinking, which, in so far as they are correct, are valuable and striking. If this volume attains wide circulation, as conceivably it may, the less scholarly and careful will almost certainly be stimulated and impressed.

The author's thesis is that the powers of Europe, excepting France

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and to some extent England, are ruled by the old feudal aristocracy, which exists in new form and allied with industry and finance, but which rules much as it did of old. The people do not control the government, and have little to say about peace and war, for foreign affairs are managed in secret by the aristocracy. And this aristocracy both rules and owns Europe, and has accumulated great riches which are invested in every lucrative field, especially in the munitions industry. Moreover their surplus wealth has gone forth to seek investment in all sorts of imperialistic enterprises overseas. Here may be found the chief source of modern wars—in the efforts of financiers to secure in backward countries or from weak peoples the placing of ruinous loans, monopolies, concessions, spheres of influence, and protectorates. As these mighty hunters prowl about the world in search of prey they meet at last, and then develop between nations, in a manner scarcely comprehensible to the mass of the people, differences irreconcilable and wars not to be avoided. Meanwhile armaments are increased and militarism perpetuated by the efforts of the ruling class, who alone cherish them, and are supported by indirect taxation which is thrust upon the poorer classes, themselves democratic and peaceful. The new era of this financial imperialism begins, according to the author, with the purchase by Disraeli of the Suez Canal shares in 1875, though the principle upon which it is founded may be traced back to Palmerston's action in the case of Don Pacifico about the middle of the century. The hope of betterment in the future lies in increasing the power of democracy, in public and democratic management of foreign affairs, nationalizing munition industries, withdrawing governmental support from the actions of financiers outside the boundaries of their country, proper adjustment of taxation, and the taking from feudal aristocracy its monopoly rights and exclusive privileges.

There is an interesting though not wholly accurate account of the present structure and character of the more important governments, with the character and condition of their peoples. The sordid methods of English enterprise in Egypt and of French penetration into Morocco are explained. A discussion of the value of colonies and of the actual profits of imperialism is admirable, as also the author's conception of the importance of control of the Mediterranean as one of the vital problems in European diplomacy. The gigantic plans dreamed of in carrying out German imperialism and in the construction of the Bagdad Railway are clearly understood and clearly set forth. Whatever the author says about taxation is worthy of attention and thought.

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In addition to a number of minor errors, which are scarcely worth recounting, the book abounds in what seem over-statements and half-truths. It is a mistake to say that the British house of lords was supreme in legislation up to 1910 (p. 16). The home rule question is no longer principally concerned with whether the Irish people or the non-resident landlords among the peers shall rule: certainly the opposition of Ulster arose largely from religious and industrial causes (p. 30). Secret diplomacy was questioned more than two centuries ago in England, and long ago in America (p. 57). Money economy was being substituted for barter and custom in some countries even before the period of the black death (p. 63). "Feudal" must be very loosely used when the author can affirm that England still retains the feudal system with respect to urban land (p. 65). It is scarcely proper to include the entire "Steel Trust" among the American munition interests in order to state that their combined capitalization is about two billions of dollars (p. 110). Certainly the English naval scare of 1909 was due to much more than the activities of Mr. Mulliner (p. 122). Some of the tables given do not necessarily prove what they are cited to sustain (p. 150). The date of the *Entente Cordiale* is not 1903 but 1904; nor was the Potsdam agreement made in 1911 but in 1910 (pp. 173, 206). I doubt whether in the years preceding the war, German industrial competition was any longer the nightmare to Englishmen which the author believes it to have been (p. 242). I do not think that imperialists sustain their plea by references to the fate of China or of Belgium (p. 276). It is not correct to assert that Charles II was permitted to collect excise duties on condition that he give up the land taxes paid by the great owners (p. 291). "Colossal" is used so repeatedly that it becomes wearisome and in the end unpleasant.

The book is dedicated to President Wilson, "whose sympathies for weaker nations and recognition of the rights of struggling peoples have shielded Mexico and China and saved us from the consequences of financial imperialism."

EDWARD RAYMOND TURNER.

Treaties, Their Making and Enforcement. By SAMUEL B. CRANDALL. Second edition. (Washington: John Byrne and Company. 1916. Pp. xxxii, 663.)

This book is a greatly enlarged and revised second edition of a doctoral dissertation originally published in 1904 in the *Columbia Uni-*

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versity Studies in History, Economics and Public Law. The character of the work is essentially legal, not political or philosophical. Usually the author states the historical background of the rule under discussion, following it by an exposition of its development in diplomatic and judicial practice. He does not generally assume to sustain any particular thesis as to the nature of the treaty-making power in this or other countries, nor to combat any of the theories asserted in the diplomatic or judicial precedents which he outlines. The book, therefore, is synthetic rather than analytic and the practitioner in law or in departmental work readily finds himself at home amidst a thoroughly logical and scholarly manner of exposition without being drawn off into lengthy argument or critical discussion.

Part I treats of the history and practice of treaty-making and treaty-enforcement in the United States (pp. 19–272). Part II deals briefly with the treaty law of the principal foreign states *seriatim* (pp. 279–339). Part III deals with the operation of treaties as between independent sovereignties and the problems of the making, interpretation and termination of treaties in the extraterritorial relations of States (pp. 343–465). A valuable appendix tabulates in alphabetical order, according to countries, the most important decisions of the United States courts relating to treaties entered into between the United States and various countries, and gives extracts of the particular articles of the treaties involved in the cases (pp. 466–621).

The author does not lay preponderating emphasis upon the conflict between the treaty-making power and the reserved sovereignty of the States, although due consideration is given it. In discussing the effect of certain treaties of the United States upon prohibitions against inheritance by aliens contained in state legislation, the author inclines to an earlier view that the treaty operates "to change the status of the alien to that of the native as to the particular right of inheritance" (p. 251). Mr. Justice Field, in writing the opinion of the United States Supreme Court in the well known case of Geofroy vs. Riggs, did not adopt this theory, but stated boldly that the operation of the prohibitions contained in the state law must be deemed suspended by the treaty. Indeed, the earlier theory appears, at least to the present reviewer, to be a species of legal quibbling, designed chiefly to allay the susceptibilities of the extreme states' rights advocate. We have, it is true, become familiar with the theory of a divided status in respect of domicile, so that a person may be domiciled in one place for the purpose of determining his subjection to taxation, and in another for the purpose

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of determining the succession to his personal estate. How far a similar disintegration of the status of nationality may occur is quite another question, and one would not be inclined to accept it without considerable misgiving.

The supreme court in recent years seems anxious to avoid the conflict wherever possible, through its power over the *interpretation* of treaties. In the case of Rocca vs. Thompson (1912) the provision in the treaty of 1853 with Argentine, providing that the consular representative of the nation to which the deceased belonged "shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs," is interpreted as giving no prior right of administration to the consul. In the opinion of the supreme court of Massachusetts and of a number of other State courts the term "right to intervene" is to be interpreted in the light of the foreign tongue from which it was taken and of the law prevailing at the time in the foreign country, instead of that of the narrower local technical definition and use of the word. The author has not critically discussed this decision of the federal court nor does the reviewer desire to do so at this time further than to say that its strictness of interpretation is in striking contrast to the more liberal standards adopted both by the supreme court and by the department of state where there is no conflict with state jurisdiction. Thus Secretary Hay, in dealing with the treaty of commerce of 1850 with Switzerland said: "Both justice and honor require that the common understanding of the high contracting parties at the time of the executing of the treaty should be carried into effect." Accordingly reciprocity in customs tariffs was conceded under a most-favored-nation clause, although contrary to the established practice of our government (p. 382).

The treaty power resides centrally or nowhere. Undoubtedly this phase of our treaty law is still in the making. The federal legislation suggested during the administration of President Taft has not been urged under that of his successor. The problem, however, is still open and must be solved. Indeed, it may some day become a crucial point in our diplomatic relations with foreign countries.

The author has done a solid piece of work and his book will be found useful and enlightening to all who seek a compact and yet complete exposition of our treaty law.

ARTHUR K. KUHN.

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